No. 83-1944-CFX
Status: GRANTED

Title: Holly Jensen, etc., et al., Petitioners
v.
Frances J. Quaring

Docketed:
May 26, 1984

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Galter, Ruth Anne E.

Counsel for respondent: Lansworth, Thomas C.

Entry	Date	Note	Proceedings and Orders
1	May 26 1984	G	Petition for writ of certiorari filed.
3	Jun 22 1984		Order extending time to file response to petition until July 29, 1984.
4	Aug 1 1984		DISTRIBUTED. September 24, 1984
5	Aug 2 1984	X	Brief of respondent Frances J. Quaring in opposition filed
6	Oct 1 1984		Petition GRANTED.
			**********
7	Nov 9 1984		Joint appendix filed.
8	Nov 15 1984		Brief amicus curiae of United States filed.
9	Oct 15 1984		Brief of petitioners Holly Jensen, et al. filed.
10	Dec 4 1984		SET FOR ARGUMENT. Monday, January 7, 1985. (3rd case).
11	Dec 6 1984		CIRCULATED.
12	Dec 15 1984	X	Brief of respondent Frances J. Quaring filed.
13	Dec 15 1984	X	Brief amicus curiae of American Jewish Congress, et al. filed.
14	Dec 22 1984		Record filed.
15	Dec 22 1984		Record filed.
16	Jan 7 1985		ARGUED.

(1) 83-1944

No._____

In The
Supreme Court of the United States
October Term, 1983

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCES J. QUARING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a statutory requirement of a photographic driver's license infringes on the respondent's free exercise of religion.

2. Whether the State's compelling interest in a photographic driver's license outweighs any incidental burden on the respondent's free exercise of religion.

3. Whether there exists a less restrictive alternative to the requirement of a photographic driver's license.

4. Whether the judicially created exemption for the respondent of the photograph requirement, based solely on religious grounds, contravenes the Establishment Clause of the First Amendment.

PARTIES

Application has been made pursuant to Rule 40.3 for the substitution of Holly Jensen as a petitioner to replace Harry "Pete" Peterson, a petitioner in the lower courts.

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The opinion of the District Court for the District of Nebraska, No. CV82-L-346, slip opinion (D.Neb. October 15, 1982), appears as Appendix A. The opinion of the Court of Appeals, 728 F.2d 1121 (8th Cir. 1984), appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 1, 1984, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §125[illegible]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Constitution of the United States

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

2. Neb.Rev.Stat. §60-406.04 (1982 Supp.), Appendix C.

STATEMENT OF THE CASE

The respondent, Frances J. Quaring, sought a Nebraska driver's license, but refused to have her photograph affixed thereto as required by Nebraska law. Neb.Rev. Stat. §60-406.04 (1982 Supp.) (App. C). She based her refusal on her literal interpretation of the Second Commandment which provides: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth." Exodus 20:4; Deuteronomy 5:8.

The respondent believes that the Second Commandment is violated by the taking of a photograph. She possesses no photographs of her family, does not own a television set, and refuses to allow decorations in her home depicting floral designs, animals or other creations in nature.

After the denial of respondent's application for a non-photographic license, respondent brought an action in the United States District Court for the District of Nebraska claiming a violation of her civil rights and alleging that the denial of her request infringed upon the free exercise of her religion in contravention of the First Amendment of the United States Constitution under 42 U.S.C. §1983 and 28 U.S.C. §1343.

The District Court found that the petitioner had shown two compelling state interests in public safety on streets and highways and security of financial transactions relative to the requirement of a photographic driver's license. However, it concluded that the creation of an exception, on religious grounds, would not pose an administrative burden of such a magnitude so as to render the entire statutory scheme unworkable. This conclusion was based on its reasoning that the requirement was not the least restrictive alternative available to the State. An injunction was issued prohibiting petitioners from refusing to grant the respondent a non-photographic driver's license.

The judgment was affirmed by a split decision in the United States Court of Appeals for the Eighth Circuit. It found that the photograph requirement constituted a burden on the free exercise of respondent's religious beliefs, and that the State's interest did not outweigh the burden imposed. It further found that the creation of an

exemption on religious grounds would not cause any undue administrative burden, nor would the exemption and accommodation of the respondent's religious beliefs contravene the Establishment Clause of the First Amendment. Judge Fagg, Circuit Judge, dissented, finding that the State's interest was of sufficient magnitude to justify an indirect burden on respondent's free exercise of religion, and that an accommodation for her would "unduly interfere with fulfillment of a government interest." *Quaring v. Peterson,* 728 F.2d 1121, 1128 (8th Cir. 1984).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decision, On A Federal Question, Of A State Court of Last Resort And With Other Federal Courts On The Same Matter.

The Eighth Circuit Court of Appeals in this case has rendered a decision on a federal question directly in conflict with the decision of a state court of last resort and with other federal courts. In affirming the decision of the district court the Eighth Circuit stated:

> The Nebraska officials bring this appeal, arguing that 1) the statute requiring driver's licenses to contain a photograph of the licensee does not burden Quaring's exercise of her religion, 2) that even if the photograph requirement burdens her religion, the state's interests outweigh that burden, 3) that no less restrictive alternative would adequately serve the state's interests, and 4) that excepting Quaring from the photograph requirement on the basis of her religion would violate the establishment clause. We reject these arguments, and affirm the district court.

Quaring v. Peterson, 728 F.2d 1121, 1122 (8th Cir. 1984). This ruling is in direct conflict with *Johnson v. Motor Vehicle Division,* 197 Colo. 455, 593 P.2d 1363 (1979). The *Johnson* case was presented to this Court, but certiorari

was denied. 444 U.S. 885 (1979). Colorado, like Nebraska, requires a photograph on its driver's licenses. The Colorado Supreme Court rejected an identical challenge and upheld the requirement. It found that the state's compelling interest in photographic identification was an "indispensable underpinning of the purposes underlying the State's interest in issuing driver's licenses." 197 Colo. at 459, 593 P.2d at 1365. The plaintiffs in *Johnson* were members of the Assembly of YHWHHOSHUA, and also based their belief on a literal translation of the Second Commandment, the same position taken by respondent in the instant action.

The Colorado Supreme Court did not question either the religious nature of the belief or the plaintiff's sincerity, citing *United States v. Ballard,* 322 U.S. 78 (1944). The standard which the Court applied was that set forth in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." It noted, however, that "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." (*Johnson v. Motor Vehicle Division,* 197 Colo. at 457, 593 P.2d at 1364, citing *Braunfeld v. Brown,* 366 U.S. 599 (1961).)

Plaintiffs in *Johnson* relied on *Sherbert v. Verner,* 374 U.S. 398 (1963). In *Sherbert* a Seventh Day Adventist was discharged when she refused to work on Saturday because of her faith, which resulted in the denial of unemployment benefits. This Court held that such a denial was an impermissible infringement on the free exercise of religion which prevented the State from denying unemployment compensation.

The *Johnson* Court applied the "balancing test" set forth in *Sherbert*.[1] It found that although there was a burden on the free exercise of religion, the State's compelling interest was of such a magnitude so as to justify the burden. It further found that to provide exemptions would undermine the very purpose of the photograph requirement.

> . . . [O]nly a photograph can provide a police officer who makes a traffic stop with a ready and instantaneous means of determining that the person tendering the driver's license is indeed the person to whom the license was issued. . . . The exigencies of law enforcement cannot brook the delay inherent in other means of identification.

Johnson v. Motor Vehicles Division, 197 Colo. at 458-9, 593 P.2d at 1365.

The decision reached by the Eighth Circuit is directly contrary to that in *Johnson*. The court below agreed that Nebraska has an important State interest in quick and accurate identification of its motorists and in the security of financial transactions. However, it concluded that those interests are not sufficiently compelling so as to justify the State's denial of respondent's request for an exemption.

In justifying their refusal to grant Quaring an exemption to the photograph requirement, the Ne-

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[1]The balancing test in *Sherbert* sets forth three elements which must be weighed in determining whether a governmental interest "overbalances" the right to the free exercise of religion.

> "[F]irst, the importance of the secular value underlying the governmental regulation; second, the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption would have on the overall regulatory program."

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 Harv. L.Rev. 1381, 1390 (1967).

> braska officials advance several state interests. First, they point out that by ensuring that only persons with valid driver's licenses operate motor vehicles, the state promotes a compelling interest in public safety. *Cf. Delaware v. Prouse,* 440 U.S. 648, 659 (1978).
>
> . . . .
>
> Although quick and accurate identification of motorists surely constitutes an important state interest, we disagree with the Nebraska officials' contention that the state's interest is so compelling as to prohibit selective exemptions to the photograph requirement.

Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984). The Eighth Circuit also rejected the argument that the creation of exemptions on religious grounds would constitute an administrative burden which would render the entire statutory scheme unworkable.[2]

The decision below is in accord with *Bureau of Motor Vehicles v. Pentecostal House,* 269 Ind. 361, 380 N.E.2d 1225 (1978). However, that case was not presented to this Court for review as was *Johnson. Cert. denied* 446 U.S. 885 (1979). The Indiana Supreme Court appeared

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[2]The Eighth Circuit implies that the record below is insufficient to support Nebraska's position that the creation of exemptions, solely on religious grounds would render the entire statutory scheme unworkable. However, the critical inquiry is the ability of the state to make *any* evaluation in this area. The difficulty in distinguishing truly religious objectors from those making false claims should weigh heavily in a judicial evaluation of the governmental interest at issue. This is compounded by the fact that any determination as to sincerity of belief in individual cases will frequently be arbitrary.

The court below characterized Quaring's belief as "unusual in the twentieth century . . .", a point the dissent deems significant. This Court has abandoned a narrow and conventional view of religion. However, the expansive treatment which has followed has made it exceedingly difficult and potentially more intrusive to evaluate an individual's belief. The invocation of undue administrative burden is particularly appropriate in this instance where there is also the broad possibility of error in assessing individual claims. Clark, *Guidelines for the Free Exercise Clause,* 83 Harv.L.Rev. 327 (1969).

to incorrectly elevate the privilege of obtaining a driver's license to that of a fundamentally protected right, and compared it to the situation addressed in *Sherbert*. "Clearly, the photograph requirement has placed the appellees in a dilemma requiring them to choose between violating an important religious principle or surrendering their driving privileges." *Bureau of Motor Vehicles v. Pentecostal House,* 269 Ind. at 367, 380 N.E.2d at 1228. The Eighth Circuit's decision is premised upon the same faulty assumption. "[I]n refusing to issue Quaring a driver's license, the state withholds from her an important benefit." *Quaring v. Peterson,* 728 F.2d at 1125. For reasons set forth in Part 2, petitioners urge that the Eighth Circuit's reliance on *Sherbert* is faulty and inappropriate, thereby rendering its precedential value meaningless to the extent it improperly addresses the *nature* of Quaring's interest in obtaining a driver's license.

The United States District Court for the District of Colorado has also ruled in accord with the Colorado Supreme Court in *Dennis v. Charnes,* 571 F.Supp. 462 (D. Colo. 1983). There, the plaintiff sought and was denied a non-photographic driver's license. The District Court sustained the defendant's motion to dismiss the plaintiff's complaint, which alleged a violation of the free exercise of religion and freedom to travel. Dennis was also a member of the Assembly of YHWHHOSHUA, and asserted his belief on a literal translation of the Second Commandment, as did the plaintiff in *Johnson* and the respondent herein.

The court in *Dennis v. Charnes,* stated that "to support a motion to dismiss, the State must show a compelling interest in having photographs on driver's licenses and there must be no alternatives available that would infringe less on First Amendment rights." *Id.* at 463, citing *Sher-*

bert v. Verner. The court concluded, as a matter of law, that the State had shown such an interest. It indicated that: "[P]hotographic identification is a central purpose for issuing drivers' licenses and exceptions would subvert that purpose." 571 F.Supp. at 464.

Therefore, it is necessary that this Court resolve not only two decisions of state courts of last resort, but the conflict between the Eighth Circuit in the instant case and the Colorado Supreme Court and a federal district court in Colorado. The diametrically opposite results on a federal question are exacerbated by the fact that Nebraska and Colorado are contiguous states. Such a proximate disparity in the treatment of a fundamental constitutional question demands a resolution by this Court.

II. The Decision Below Raises An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court; And The Decision Is In Conflict With Applicable And Related Decisions Of This Court.

(A) There Is No Burden On Respondent's Free Exercise Of Religion.

Both the district court and the Eighth Circuit relied heavily on *Thomas v. Review Board,* 450 U.S. 707 (1981). In *Thomas* this Court considered whether a state's denial of unemployment compensation benefits to a Jehovah's Witness, who voluntarily terminated his job because of his religious belief, constituted a violation of his First Amendment right to the free exercise of religion. It was held that the denial of these benefits constituted a violation of the free exercise clause of the First Amendment. "Here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; ..." 450 U.S. at 717.

The extension of judicially created exemptions, on religious grounds, from the application of state statutes

has been controversial and sharply debated. *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Board*, 450 U.S. 707; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398; *Abington School District v. Schempp*, 374 U.S. 203 (1963). A recent area of controversy has arisen in unemployment compensation or social welfare benefits. In *Sherbert*, (factually similar to *Thomas*), a Seventh-Day Adventist was discharged for her refusal to work on Saturday, her day of worship, and was denied unemployment compensation benefits. In holding that such a denial was an impermissible violation, this Court stated:

> This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." Everson v. Board of Education, 330 U.S. 1, 16.

Sherbert v. Verner, 374 U.S. at 410.

The critical threshold inquiry in this, as in every case, is whether or not there is an actual *burden* on the free exercise of religion. Repeated emphasis is placed upon the *coercive* impact on an individual to choose between adherence to his faith and the receipt of a public benefit.

> [T]he Court recognized with respect to Federal Social Security benefits that "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause" (citation omitted) . . . [C]onditions upon public benefits cannot be sustained if they so operate whatever their purpose as to inhibit or deter the exercise of First Amendment freedoms . . .
>
> Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal

> principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Id. at 405-406.

The element of coercion of action which is contrary to religious belief is basic to a free exercise claim. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Review Board,* 450 U.S. 707; *Sequoyah v. Tennessee Valley Authority,* 480 F.Supp. 608 (E.D.Tenn 1979); *aff'd* 620 F.2d 1159 (6th Cir. 1980, *cert. denied* 449 U.S. 953 (1980); *Valencia v. Blue Hen Conference,* 476 F.Supp. 809 (D.Del. 1979). "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief. (citations omitted) . . . This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices." *Sequoyah v. Tennessee Valley Authority,* 480 F.Supp. 608.

The instant situation is markedly different from those involving coercion of action. Respondent's belief is based on a personal and literal interpretation of the Second Commandment which provides that "Thou shalt not make unto Thee any graven image, or any likeness of anything that is in Heaven above, or that is in the Earth beneath or that is in the water under the Earth." Exodus 20:4; Deuteronomy 5:8. Respondent is not a member of any organized religion, and the church that she occasionally attends does not subscribe to her particular belief. There is no indication that in the absence of a driver's license, she would not be able to secure alternate means of transportation, albeit inconvenient, or to attend church services or to practice her belief. It is well established that economic disadvantage or inconvenience is not sufficient to justify an exemption on religious grounds.

> [W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference, • • •

> Consequently, it cannot be expected, much less required that legislators enact no law regulating conduct that may in some way result in * * * disadvantage to some religious sects * * *. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

Quaring v. Peterson, 728 F.2d at 1128-29, Judge Fagg, dissenting.

The Eighth Circuit concedes that "the Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience." 728 F.2d at 1125. However the court below then concludes that "a burden upon religion exists when 'the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, * * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.,* citing *Thomas.*

The choice presented to the respondent is whether to violate her belief and allow herself to be photographed or to forego the privilege of obtaining a driver's license. The requirement of a photograph in no way interferes with her actions or the practice of her belief. "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." *Braunfeld v. Brown,* 366 U.S. at 603 (1961).

The importance of the federal question involved, *i.e.,* accommodation of respondent's claim solely on the basis of religion, is further enhanced by the fact that 47 states now require photographic driver's licenses. This is not an isolated case, and its ramifications will have national significance. Such a situation creates a conflict which this Court can and should resolve. *People of New York v. O'Neill,* 359 U.S. 1 (1959); *McGee v. International Life Insurance Company,* 355 U.S. 220 (1957).

The rationale utilized by the Eighth Circuit's reliance on *Thomas* and *Sherbert* is preliminarily and fatally flawed. Further, it is not in accord with apposite decisions of this Court and other federal courts regarding the most elemental analysis of the questions presented. In its assessment of the burden on respondent's free exercise of religion, the majority, citing *Thomas,* states:

> [I]n refusing to issue Quaring a driver's license the state withholds from her an important *benefit.* Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

(Emphasis added.) 728 F.2d at 1125. The lower court further finds the burden on respondent to be *indistinguishable* from the burden placed upon the Sabbatarian in *Sherbert.* It is this rudimentary error in defining the burden on respondent which, of necessity, invalidates the remainder of the lower court's analysis and conclusions.

The Eighth Circuit has ignored previous pronouncements of this Court and other federal courts concerning the *nature* of the interest involved—the ability to drive an automobile. The faulty premise entertained is that there is a fundamentally protected *right* to drive an automobile. While this Court has held that there is a protectable property interest in a driver's license (*once granted*) to the extent that it may not be revoked or suspended without due process guarantees, it is evident that the nature of the interest at stake is an important consideration in determining the *level of protection afforded.* "Accordingly, . . . consideration of what procedures due process may require under any given set of circumstances must begin

with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Goldberg v. Kelley,* 397 U.S. 254, 263 (1970). *See also, Dixon v. Love,* 431 U.S. 105 (1977); *Bell v. Burson,* 402 U.S. 535 (1971).

It is elemental that if respondent has no fundamental right to drive, there can be no burden on the free exercise of her religiou caused by the denial of a nonphotographic driver's license. Both *Sherbert* and *Thomas* dealt with the receipt of public welfare *benefits.* This Court has clearly distinguished such interests from the instant case.

> [A] driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence . . . . We therefore conclude that the nature of the interest here is not so great as to require us "to depart from the ordinary principle, established by out decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

Dixon v. Love, supra, at 113.

The Second Circuit has specifically held that there is no fundamental right to a driver's license. In a suit challenging the constitutionality of a Vermont statute providing for the suspension of the right to drive of persons who have not paid the automobile purchase and use tax assessment, the court found that the plaintiff needed to be able to "drive to visit the doctor, shop for groceries, and attend to other details of family life. No other member of his household holds a driver's license." *Wells v. Malloy,* 402 F.Supp. 856, 858 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2d Cir. 1976). In rejecting a strict scrutiny test in response to an alleged equal protection argument, the court noted: "In this instance there is no fundamental right. Although

a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858. *See also, Montgomery v. North Carolina Department of Motor Vehicles,* 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979); *Perez v. Tynan,* 307 F.Supp. 1235 (D.Conn. 1969).

It is patently clear that the state's *grant* of a driver's license carries with it the concomitant ability of the state, through its police power, to place whatever reasonable restrictions it wishes on its issuance and use.

> Although the privilege might be a valuable one, it is no more than a permit granted by the state, with its enjoyment depending upon compliance with prescribed conditions and always subject to such regulation and control as the state may deem necessary to preserve the safety, health and morals of its citizens.

Ogren v. Miller, 373 F.Supp. 980, 982 (W.D.Ky. 1973). The court in *Ogren* specifically pointed out that even if the right to drive were a property right, it would still be subordinate to the state's right to regulate and control its issuance and use. "The Commonwealth, in the exercise of its legislative wisdom, through its police powers, can delineate any reasonable limitations it wishes in bestowing the privilege." *Id.* at 982.

Absent the involvement of a fundamental right, Nebraska's requirement of a photographic driver's license must only bear a rational relationship to the statute's objective. *Wells v. Malloy,* 402 F.Supp. 856 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2nd Cir. 1976). This was met in the lower court's specific finding that quick and accurate identification of motorists and security of financial transactions serve important state interests. In that there is no

right to drive, the inquiry should have proceeded no further. "[W]e may take it as settled that such a right, federal or state, does not exist." *Raper v. Lucey,* 488 F.2d 748, 751 (1st Cir. 1973).

This Court has noted the critical distinction to be drawn between *Thomas* and *Sherbert* and other situations presented to it for review. In *United States v. Lee,* 455 U.S. 252 (1982), a case involving the imposition of social security taxes upon members of the Amish sect, Justice Stevens in his concurrence noted the tension between *Lee* and the situations presented in *Sherbert* and *Thomas.* "Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." *Id.,* n. 3, pp. 263-64, Therefore, this Court's findings in *Thomas* and *Sherbert* should be viewed as a reaction to *disparate* treatment because of religious views as opposed to the grant of *favored* treatment for the members of a particular religious sect. *Id.*

If one examines the instant case in view of the *nature* of the interest involved, i.e., the "right to drive," the inescapable conclusion must be that the question of a *burden* on the free exercise of religion never arises. We have no coercion of actions contrary to belief. We do have the forbearance of driving an automobile as an accommodation to respondent's belief. However, that personal decision on her part in no way requires a First Amendment analysis in the judicial sense. The state must only show a rational relationship between the photograph requirement and a legitimate state purpose. In that not one, but two, *compelling* interests were demonstrated, both lower courts erred in allowing the inquiry to proceed beyond this elemental determination.

(B) The State's Compelling Interest Outweighs Any Incidental Burden On Respondent's Free Exercise Of Religion.

Assuming arguendo that respondent's free exercise of religion is burdened, the lower court's decision is also in conflict with this and other federal court decisions regarding the state's compelling interest in ready and instantaneous identification of regulated individuals, including licensed drivers. *Dennis v. Charnes,* 571 F. Supp. 462; *United States v. Lee,* 455 U.S. 252; *Johnson v. Motor Vehicle Division,* 593 P.2d 1363; *Forbush v. Wallace,* 341 F.Supp. 217 (M.D. Ala. 1971); *Goldberg v. Kelley,* 397 U.S. 254.

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." . . .
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> • • •
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> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 259-261.

Free exercise claims have been raised against the requirement and/or utilization of social security numbers. These numbers serve an important and compelling state interest in identification—a similar, if not the same, purpose served by photographic driver's licenses. In *Calla-*

han v. Woods, 559 F. Supp. 163 (N.D. Cal. 1982), the court found, on remand from the Ninth Circuit (after the decision in *Thomas*), that the indirect burden "is heavily outweighed by the government's compelling interest in requiring each aid recipient to have a SSN, and the Court further holds that this is the least restrictive means of achieving its all-compelling interest in administrative viability of administering the enormous social security program, . . ." *Id.* at 164.[3] The court in *Callahan* relied on *United States v. Lee*, for the proposition of a compelling interest in the administrative viability of the system. A similar argument was set forth by Judge Fagg in his dissent in the instant case.[4]

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[3]On Appeal, the Ninth Circuit has again remanded this case for a determination of the cost of exempting Callahan from the SSN regulation. Callahan v. Woods, No. 83-1688, slip opinion (9th Cir. March 30, 1984).

[4] Nebraska's photographic license requirement advances the state's interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violaton or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of the 50 states require a photographic driver's license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state's compelling interest in internal "quick and accurate identification of motorists." Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting "selective exemptions" to the state's requirement would impair the state's ability to achieve its objective. This approach simply ignores or casts aside the state's legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring's religious practice by issuance of a driver's license lacking a photographic

(Continued on following page)

The court in *Callahan* distinguished *Thomas,* finding it significantly different, "*Thomas* dealt with a requirement for eligibility for receipt of benefits . . . that constituted the substantive criteria for participation in a government program, but did not affect the fundamental administration of the system as a whole; . . ." The court also emphasized the unique identification value of a social security number finding that it is "necessary to enable the system to function." *Callahan v. Wood,* 559 F.Supp. at 169-170. An opposite result was reached in *Stevens v. Berger,* 428 F.Supp. 896 (E.D.N.Y. 1977). However, that decision appears to be based upon insufficiency of evidence presented on behalf of the state. *Mullaney v. Woods,* 158 Cal.Rptr. 902, 97 Cal.App.3d 710 (1979), used the same compelling state interest standard but ruled opposite *Stevens.* "The use of a number to identify each recipient of aid was intended to facilitate the administration of the vast, constantly growing, welfare programs. . . . The chief value of a system lies in its ability to apply uniformly to all within its scope, without exception." 158 Cal.Rptr. at 911-12, 97 Cal.App.3d.

Another instance of this Court's emphasis on identification is found in *United States v. O'Brien,* 391 U.S. 367 (1968), *rehearing denied,* 393 U.S. 900 (1968), a case dealing with criminal convictions for burning draft cards. In upholding these convictions, this Court stated that:

> The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the func-

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identifier would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee,* 455 U.S. 252, 259 (1982). "The ready certainty inherent in photographic identification would be lost." *Johnson v. Motor Vehicle Division,* 593 P.2d 1363, 1365 (Colo. 1979).

> tioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

Id. at 377-378.

A free exercise claim was also denied in *Powers v. State Department of Social Welfare*, 208 Kan. 605, 493 P.2d 590 (1972). There an individual refused, on religious grounds, to submit to a medical exam as a prerequisite to the receipt of welfare benefits. In rejecting a free exercise claim, the court stated that:

> "A State acting through the police power may reasonably limit the free exercise of religion for the protection of society. Where the exercise of legislative power comes into conflict with the freedom of religion, the validity of legislation will depend upon the balance of the factors affecting the public interest. The individual cannot be permitted on religious grounds to be the sole judge of his duty to obey laws enacted in the public interest.

208 Kan. at 614, 493 P.2d at 597-598. As discussed previously, the compelling state interest in identification of licensed drivers has been found to outweigh any incidental burden on an individual's free exercise of religion. *Johnson v. Motor Vehicle Division*, 593 P.2d 1363 and *Dennis v. Charnes*, 571 F.Supp. 462. It is evident that the state's interest in instantaneous identification of its licensed drivers and in the security of financial transactions outweighs any alleged incidental infringement on respondent's free exercise of religion. "[T]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S.

at 606, cited in *Thomas v. Review Board,* 450 U.S. 722. Further, the compelling interest of the state is directly related to the safety and welfare of its citizens in general. The ability of a state to limit the free exercise of religion is appropriately given in instances which involve such matters. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Collins,* 323 U.S. 516 (1945).

(C) There Are No Less Restrictive Alternatives To The State's Requirement Of A Photographic Driver's License.

Petitioners are of the firm conviction that the court's inquiry should have ceased upon the determination that no burden existed on respondent's free exercise of religion. Therefore, any discourse regarding the availability of least restrictive alternatives is superfluous. However, for sake of argument, petitioners would urge that the lower court's judicially mandated exemption, solely on religious grounds, presents insurmountable and impermissible obstacles to the state's implementation of such a system. In reality, less restrictive alternatives are almost always available, provided that the state is willing to sacrifice effectiveness. It is not clear what role the concept of "least restrictive alternatives" plays in First Amendment jurisprudence. Courts can frequently decide cases which raise First Amendment questions without appealing to the less drastic means test (the position urged by petitioners herein for the reason that the court's inquiry was complete upon an examination of the alleged burden on respondent's free exercise of religion). However, most cases are decided on a balancing test of the conflicting values and interest.

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power

> of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. at 377. *See also*, Note: Less Drastic Means and the First Amendment, 78 Yale Law Journal 464 (1969).

The Eighth Circuit indicates that the denial of a non-photographic license to the respondent does not represent the least restrictive means available to accomplish this state's objective. It is unclear in the lower court's opinion, as well as in other case law, what showing is necessary by the government to prove that no other alternative is feasible. It was the testimony of Colonel Kohmetscher, Superintendent of the Nebraska State Patrol, that no other means of identification was an effective alternative to the photographic driver's license. Additionally, it is obvious that the administration of applications for exemptions would be cumbersome, costly, and would very likely result in disparate treatment. In that instance, the government's compelling interest should not be compromised on the basis of an alleged incidental infringement on respondent's belief, particularly when that infringement in no way interferes with the exercise or practice of respondent's religion, or coerces to her act in a manner inconsistent with her belief.

Perhaps of greater significance is the impropriety of having Nebraska officials determine, on a case-by-case basis, with no guideline whatsoever from the court, the religiosity and sincerity of individual belief. While asserting the ease with which this can be accomplished, the court below has apparently ignored the dangerous arena

into which Nebraska's administrators have been thrust. The situation is compounded by the very nature of the inquiry which would be necessary in order to determine whether or not an exemption should be granted on religious grounds. In the early case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court expressed a grave concern that government officials ought not have the capacity to determine whether or not certain causes are religious in nature. The issue in *Cantwell* was the certification of those soliciting on religious grounds.

> It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is *empowered to determine whether the cause is a religious one*, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

(Emphasis added.) *Id.* at 305. This Court further distinguished between those actions by a government agent which are ministerial as opposed to discretionary. In the event that a government official exercises discretion in determining the *religious nature* of a cause, his actions constitute a prior restraint and lay a forbidden burden upon the exercise of liberty protected by the Constitution. It is axiomatic that governmental questioning of the truth or falsity of beliefs is proscribed the First Amendment. Further, the difficulty of an investigation of an applicant

for an exemption is seriously compounded when the relevant belief does not, on its face, fit any generally recognizable religious framework. *Stevens v. Berger*, 428 F. Supp. 896.

The Eighth Circuit has, in essence, required Nebraska officials to exercise their discretion in determining whether or not an applicant's request for an exemption is based on religious grounds. Conceding that respondent's beliefs are "unusual in the twentieth century", the lower court has failed to address the impossibility, much less the impropriety, of forcing administrative officials to perform this task.

(D) The Judicially Mandated Exemption Is In Violation Of The Establishment Clause Of The First Amendment.

The mandated exemption for respondent from the photograph requirement is also in direct conflict with pronouncements from this Court regarding violations of the Establishment Clause of the First Amendment. As most recently stated in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984):

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

104 S.Ct. at 1362, citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Justice Stewart, in his concurrence in *Sherbert* expressed grave concerns as to the violation of the Establishment Clause in holding that unemployment benefits could not be denied based upon the claimant's refusal to work on Saturdays.

> The Court says that South Carolina cannot under these circumstances declare her to be not "available for work" within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.
>
> Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite resut. If the appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work" within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.

Sherbert v. Verner, 374 U.S. at 414-415.

These same concerns were raised in *Thomas v. Review Board,* 450 U.S. 707. Justice Rehnquist in his dissent focused on the growth of social welfare legislation during the latter part of the 20th Century. In his opinion, this growth has greatly magnified the potential conflict between the two Clauses. "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment." *Thomas v. Review Board,* 450 U.S. at 722. Recently, in *United States v. Lee,* Justice Stevens in his concurrence, noted that:

> [T]he principle reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one

> religion over another is an important risk the Establishment Clause was designed to preclude.

455 U.S. at 263, n.2.

The decision below falls squarely within the ambit of the concerns raised above. The Eighth Circuit effectively required the state to make an exception *solely* on the basis of a claimant's religion. Necessarily, the state must then determine the "religiosity" of the claim, a delicate if not impermissible task. An analogy can be drawn between the instant situation and that presented in *Yott v. North American Rockwell Corporation*, 428 F.Supp. 763 (C.D. Cal. 1977). The constitutionality of a particular statute was at issue which required employers to make reasonable accommodations respecting religious observances and practices. The court pointed out that religious freedom and secular governmental approach to religious institutions are guaranteed by the First Amendment.

> The First Amendment allows no such choice. Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. (citations omitted).

Id. at 767.

The decision of the court below is in direct contravention of the purposes of the Establishment Clause. Interpretations of the Clause may vary. But, whatever historical position one takes concerning the development of the Free Exercise Clause and the Establishment Clause,

the mandate of the Constitution remains viable. "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 Villanova Law Review 3 (1978) at 24. The finding of the lower court is that the state is *compelled* to grant an exemption based solely on a claimant's religious belief. The Establishment Clause, of necessity, proscribes the granting of an exemption or the conferring of a benefit based entirely upon the religiosity of the claim when the interference with the claimant's belief is incidental, and there is no element of coercion as required by *Sherbert* and *Thomas.* Nor is the respondent's desire to have a driver's license deserving of such treatment.

Given this Court's differing views of the application of the Establishment Clause, and given the need to define the *nature* of the interest involved in the instant situation, the issue presented is ripe for adjudication. The expansion of free exercise guarantees has been in the area of denial of benefits of otherwise available public welfare legislation. The incidental infringement upon respondent's belief is insufficient to extend the grant of an exemption, based solely upon religious grounds, to respondent's request for a nonphotographic driver's license. As pointed out by Judge Fagg in his dissent:

> I have no quarrel with the majority's observation that Quaring may experience daily inconvenience because she cannot drive a motor vehicle. Her difficulties, however, are not insurmountable and she is not the only person that has been faced with the need to make life-style adjustments precipitated

> by nonconformity with driver's license requirements. Not insignificantly, and as the majority notes, Quaring's religious beliefs are "unusual in the twentieth century" and "the photographic requirement in no way compels Quaring to act in violation of her conscience." I cannot say that the state's legitimate requirement of a photographic identifier has placed impermissible pressure on Quaring to modify her behavior and violate her beliefs to the end of obtaining driving privileges upon the roadways of Nebraska.

728 F.2d at 1128.

While the Eighth Circuit went to great lengths to establish the sincerity and centrality of respondent's belief, these attributes alone are insufficient to support the exemption under existing constitutional precepts. The decision and its reliance upon inapposite case law is supportive only of a means to a desired end. However, sympathetic the court may be towards the respondent, the clear mandate of the First Amendment precludes the carving out of an exemption to a constitutional statute based solely on her individualized belief. Regardless of the desirability or equitable nature of the result, the decision below flies squarely in the face of constitutional mandates.

CONCLUSION

Perhaps the clearest reason for this Court to grant certiorari in the instant case is the fact that the decision of the court below is in direct conflict with the Supreme Court of Colorado as well as with a federal district court in the Tenth Circuit. *Johnson v. Motor Vehicle Division*, 593 P.2d 1363; *Dennis v. Charnes*, 571 F.Supp. 462. Of great significance is the fact that 47 other states share a like requirement of a photographic driver's license. The inconsistency and uncertainty which will result is of prime

importance in petitioning this Court for a resolution of an important federal question. It is also necessary to define the scope and extent to which this Court will embrace claims regarding the free exercise of religion.

Although petitioners have treated several aspects of the decision of the court below, petitioners place great emphasis on the fact that the court below erred in its preliminary determination that a *burden* existed at all upon the respondent's free exercise of religion. The initial faulty assumption that the ability to drive an automobile is a fundamentally protected right or is equivalent to public welfare benefits discredits the entire opinion. The comparison to *Thomas* and *Sherbert* and the extension of the rationale therein is not only unsupported, but violates the Establishment Clause of the First Amendment. The confusion resulting from the disparity between the Eighth and Tenth Circuits is compounded by the lower court's insensitivity to the state's compelling interest in instantaneous identification of its licensed drivers.

It is interesting to note that the trial court, as well as the Eighth Circuit observed that the photograph requirement in no way compels respondent to act in violation of her conscience. As stated previously, one of the fundamental inquiries is the *coercion of action* contrary to belief. Such an element is basic to a free exercise claim. The absence of coercion is therefore supportive of the argument that no burden exists on respondent. Given the disparity of decisions below, and the inapposite treatment of existing case law, petitioners respectfully urge that this Court grant the petition for certiorari to resolve the questions presented herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-346

FRANCES J. QUARING,

Plaintiff,

vs.

HARRY "PETE" PETERSON, Director of the Deparment of Motor Vehicles, State of Nebraska; WILLIAM EDWARDS, Deputy Director of the Department of Motor Vehicles, State of Nebraska,

Defendants.

MEMORANDUM AND ORDER

(Filed October 15, 1982)

I.

This lawsuit has been brought by Frances J. Quaring against the director and deputy director of the Department of Motor Vehicles of the State of Nebraska under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, alleging a deprivation of her right to the free exercise of religion. A hearing on the plaintiff's request for a preliminary injunction was held on August 13, 1982, and by consent of the parties the hearing will comprise the trial on the merits.

The plaintiff's complaint is occasioned by the requirement contained in § 60-406.04, R.R.S. Neb. (Supp. 1981), that all motor vehicle operators' licenses issued in the State of Nebraska, with exceptions not applicable to the plaintiff, contain a color photograph of the licensee. The plaintiff takes issue with this requirement because of her religious beliefs concerning prohibitions of photographs. She testified at the trial that her beliefs regarding the

prohibition of graven images contained in Exodus 20:4 and Deuteronomy 5:8 of the Bible, known to some as the Second Commandment, prohibit her from being photographed for the license. Because of the absence of a statutory exception allowing the plaintiff to receive an operator's license without a photograph, she has been unable to receive a current license.

The plaintiff testified concerning the exact nature of her beliefs relating to photographs. Under her interpretation of the Second Commandment, she is prohibited by God from having any sort of likeness of things created by God. She believes the prohibition to be so broad-reaching as to require that she possess no photographs, paintings, floral-designed clothing, drapes or carpeting, or drawings that would contain a likeness of items in creation. When she purchases foodstuffs displaying pictures, she either removes the picture or obliterates it with a black marking pen. She possesses no pictures of her wedding or of her children; no television is allowed in her home.

The plaintiff's beliefs come from a self-study of the Bible undertaken after a personal tragedy some years ago. Although she and her family have extensively studied the Bible for a number of years, they do not formally belong to any organized religious body. They attend a Pentecostal Church in Gibbon, Nebraska, but are not formally enrolled members. Occasionally, the plaintiff plays the piano for the Pentecostal Church at Gibbon. They also attend nondenominational Bible study groups. The plaintiff's beliefs are similar to those of the Pentecostal church members, although they differ with respect to the interpretation of the prohibition of graven images.

Many Pentecostals, according to the plaintiff, probably do not interpret the commandment as prohibiting the *possession* of all representations of things in creation; rather, the commandment prohibits the *worshipping* of images or idolotry. The effect of violating the commandment by allowing oneself to be photographed would, according to the plaintiff, be a transgression of the law of God, separating humans from God.

The sincerity and religiousness of the plaintiff's belief were addressed at trial by John Turner, a professor of religious study. He testified that the plaintiff's belief concerning photographs and other images is supportable as arising out of an understanding that the ancient Hebrew nation had concerning the remaking of items in creation, and that the plaintiff's beliefs can be analogized to the Hebrew concept that symbols are an attempt to capture God and His creations and that such an attempt is prohibited.

Dr. Turner also addressed the sincerity of the plaintiff's belief with respect to the need to be affiliated or formally enrolled in a recognized body corporate of individuals holding like religious beliefs. He stated that membership and association in a religious organization typically are not the same thing; membership involves a formal commitment to the group, while association may lack any particular commitment. Dr. Turner indicated that different branches of religious beliefs have varied views as to the significance of membership. Many western religions attach a high priority to enrolled membership. Others, particularly the more fundamentalists, such as the Pentecostal, attach a lowered significance to the formal enrollment vis-a-vis mere association.

The plaintiff has made several attempts to obtain a valid operator's license without a photograph. She had her Nebraska legislator contact the Department of Motor Vehicles in an attempt to obtain an exception, and the Nebraska State Ombudsman was contacted. After talking with individuals at the Department of Motor Vehicles, the plaintiff decided to take the examination to qualify for an operator's license and then seek an exception. She passed the examination, and she then applied to the Department of Motor Vehicles for an exception from the photograph requirement. The director of the department denied the application of June 3, 1982, because he could find no statutory or constitutional authority to grant an exception.

The inability to obtain a valid operator's license is of great concern to the plaintiff. The plaintiff and her husband operate a farming operation in Buffalo and Hall Counties, Nebraska, encompassing livestock and over one thousand acres of row crops. The plaintiff manages her own herd of dairy and beef cattle and needs to drive vehicles to do so. Her husband is unable to provide her with transportation, because he is occupied from early morning to late in the evening with other parts of the operation that are several miles from the plaintiff's herd. In addition, the plaintiff is employed as a bookkeeper in Gibbon, Nebraska—about ten miles from her rural residence—and needs transportation to that job.

Witnesses for the defendants testified as to the state's need for photographs on the licenses and the potential administrative burden of a religion exception to the photograph requirement. Elmer Kohmetscher, Superintendent of the Nebraska State Patrol, testified about

the use and value of photographic operator's licenses in law enforcement. The Nebraska operator's license contains both a physical description, detailing height, weight, eye color, hair color, sex and race of the licensee, and a color photograph. The laminated photographic license makes counterfeiting and transferring of licenses between individuals much more difficult. Prior to the requirement of a photograph, it was common for individuals to be able easily to counterfeit a license merely by altering physical descriptions. In addition, individuals with similar physical descriptions could trade licenses, making it difficult for law enforcement officials to ascertain readily the identity of the bearer of the license.

Photographs on the license provide not only a ready form of identification for law enforcement officials but also a fairly accurate means. Kohmetscher testified that individuals have unique facial features, distinguishing them from others. Once an officer has confirmed that the person depicted by the photograph on the license is the same as the person from whom he has requested identification, he is fairly certain of the accuracy of the identification.

Two of the defendants' witnesses, Wayne Green and William Morrissey, testified concerning the administrative details of the issuance of licenses and of a possible exception to the photograph requirement. Green, the chief license examiner, testified that county treasurers—not the Department of Motor Vehicles—are responsible for issuing the photographic license and for taking the photographs, performing this function with the guidance of a manual prepared by the Department. Once a treasurer issues a photographic license, one copy of the license

without the photograph is retained at the treasurer's office and one copy without a photograph is sent to the Department's central office. The only copy with a photograph stays with the licensee. The imposition of a religious exception to the photograph requirement would not vary the examination process, only the issuance process at the county treasurer's office.

Morrissey, the associate director of driver services for the Department, testified further about the guidelines sent to the county treasurers and the other types of permits which are issued without the requirement of a photograph. Morrissey felt that a religious exception to the photograph requirement would be difficult to handle. He pointed to the large volume of applicants processed in the Omaha and Lincoln metropolitan areas as illustrative of the problem. He stated that the written directives to county treasurers could be issued to detail the requirements for a religious exception, and that the decision as to whether a person may qualify for a religious exception to the photograph requirement could be administered by the Department of Motor Vehicles, thereby avoiding problems in crowded areas, such as Omaha and Lincoln, especially since at least in recent times there have been only one or two requests for such an exception.

Morrissey also testified concerning special permits that do not contain a photograph: school permits for farmers' children between the ages of fourteen and sixteen, farm machinery permits to allow farm children under sixteen to drive farm machinery, special permits for those with restricted or minimal driving ability, temporary licenses for individuals outside the state whose licenses have expired, and learners' permits for individuals

between the ages of fifteen and sixteen. Of all these special permits, only learners' permits have a significant number outstanding.

The legislative history of the photographic requirement sheds further light on the need for this requirement. At least four purposes were identified in the hearings before the Public Works Committee of the Nebraska Legislature. Substantial attention was given to the problems that had been encountered with counterfeiting the previous licenses. The need for photographic identification in traffic law enforcement was discussed as a second concern. A third concern was the problems encountered with the previous nonphotographic licenses and the sale of alcoholic beverages. Several individuals testified as to the problems of ascertaining the age of purchasers of alcoholic beverages without the aid of positive photographic identification. A fourth concern was the use of a driver's license for identification in financial transactions, particularly the use of the license when writing or cashing checks. See *Hearings Before the Public Works Committee, Nebraska Legislature,* 16-34 (1-26-77).

It seems that all four of the above concerns display an interest in public safety and security. The need to have accurate, unaltered identification when concerned with the identity of a driver of a vehicle on public streets is unquestionably related to the public safety and security. In addition, accurate identification aiding in the restriction of the sale of alcoholic beverages to minors furthers the public safety concern inherent in those restrictions. The state also has an interest in the security of private financial transactions, because it has offered its protection to private individuals against certain misuses

of financial instruments. See, e.g., §§ 28-512 (theft by deception), 28-602 to 28-603 (forgery), and 28-611 (issuing a bad check), R.R.S. Neb. (Reissue 1979).

II.

The plaintiff has challenged the photograph requirement of § 60-406.04, R.R.S. Neb. (Supp. 1981), as violative of her First Amendment right to exercise freely her religion. It is well settled that a sincerely held religious belief may give rise to First Amendment protection when a state seeks to compel a choice "between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). Even though a law does not discriminate on its face, it is invalid should it unduly burden the free exercise of religion through its application. *Id.*

The determination of whether the plaintiff's claim is one that should be afforded protection is twofold. First, there must be a determination that the belief, whatever the nature, is sincerely held. Second, the court must decide whether the belief is a religious one entitled to First Amendment protection. See *Stevens v. Berger*, 428 F. Supp. 896, 901 (U.S.D.C. E.D. N.Y. 1977).

I have no doubt that the plaintiff's belief is sincerely held. At trial the plaintiff appeared ready to support her interpretation of the Bible, based on her knowledge of several portions of the Old Testament. In addition, the plaintiff's behavior in every way conforms to the prohibition as she understands it: her home contains no photographs, television, paintings, or floral-designed furnishings, and, as she testified, she goes so far as to remove or obliterate pictures on food containers.

A further examination of her belief then is necessary to determine whether it is of a religious nature. It is possible to examine the nature of a belief based on either the content of it or the function it plays in the person's life. See Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056 (1978). Although the content-based tests appear to be in disfavor, compared to functional tests, I believe that under either line of reasoning the plaintiff's belief qualifies as a religious belief. Frequently, tests for the content of a religion focus on whether the particular belief rests on a defensible position taken with respect to theological traditions. See *Stevens v. Berger,* supra, 428 F. Supp. at 902-903. The plaintiff's belief concerning the prohibition of photographs has some grounding in theological traditions. The plaintiff's expert, Dr. Turner, testified that the plaintiff's belief has support in Old Testament understandings of the graven images prohibition. Such a basis is adequate to allow the claim to pass a test based on content.

Other authorities suggest that a functional test of a belief is more appropriate. See Note, 91 Harv. L. Rev. 1056, 1067. The Supreme Court of the United States appears to have gone some distance recently in adopting a functional test. In *Thomas v. Review Board,* supra, the court looked not to the content of the plaintiff's belief but to the role that the belief played in his life—the court looked more to whether there was a determination in the court below that there was an honest conviction held by the plaintiff coupled with activity in conformance therewith. *Id.,* at 715-716. The court cautioned, however, that there could be a belief "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.,* at 715. As such, there appears

to be a possibility that on the extreme peripheries of some beliefs, content may become a strong factor in determining whether a belief is religious. The plaintiff's belief does not fall within that periphery; evidence at trial shows that it is clearly within the ambit of traditional Judeo-Christian beliefs. The plaintiff's belief so sincerely held and her action in conformance therewith are thus entitled to First Amendment protection.

The defendants vigorously assert a position that the plaintiff's lack of membership in an organized religious body is fatal to any claim. They contend that a belief cannot be truly religious unless the believer has some association with a religious body, and without such a check on belief, the state would have no manner of knowing when a belief is truly religious and the extent of the belief. This claim must fail for at least two reasons. First, I believe that the plaintiff is a member of a religious organization. Her expert on religion testified that fundamentalist groups, such as the Pentecostal Church the plaintiff attends, frequently consider association to be the important facet of belonging to a group; formal membership is not required. Should it be necessary, I would easily be able to make a factual finding that the plaintiff's association with the Pentecostal group is membership. That her belief regarding the taking of photographs differs from that of the main body of members is of no import when determining whether a belief is protected by the First Amendment. See *Thomas v. Review Board,* supra, 450 U.S. at 715-76.

Second, I do not believe that formal membership is necessary to fall within the ambit of the First Amendment's protection. The focus of *Thomas v. Review Board,*

supra, is on the belief itself, not on the plaintiff's membership in any organization. Although "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests," *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972), it is not necessary to require actual membership in an organized body of believers to find that a belief is constitutionally protected. Beliefs will be found, under the functional test, to be nonreligious when there are clearly nonreligious motivations to the beliefs or asserted beliefs. The motivations bear on the sincerity of the belief and undoubtedly there will be difficulty in showing a pattern of behavior consistent with such a belief. In addition, bizarre claims may be scrutinized under a content test, thereby bringing the substance of a nonmember's belief into question. Furthermore, the fact that a belief is one within the ambit of First Amendment protection does not end the matter. The nature of the belief may well bear on the compelling nature of the state interest needed to require that the belief yield.

After a determination that the plaintiff's free exercise of religion is being burdened, the focus of my inquiry must turn to whether the state has demonstrated that it is serving a compelling state interest with the photograph requirement. See *Wisconsin v. Yoder*, supra, at 215. The evidence indicates at least three identifiable interests that the state seeks to advance as compelling: public safety on the streets and highways, security of financial transactions, and the administrative burden of an exception.

I do not accept the administrative burden of establishing an exception as a compelling state interest. To be compelling, a state's interest must represent "only the

gravest abuses, endangering paramount interest." *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). As such, administrative inconvenience short of rendering an entire statutory scheme unworkable is not a compelling state interest. *Id.,* at 409.

The concerns about public safety and security of financial transactions have more appeal. It is almost without question that the state has a vital interest in being able to regulate adequately those driving on its highways. The potential for death and destruction from motor vehicles is great. To further a goal of ensuring that only those able to drive properly are on the roads, the state needs a form of identification. Experience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the integrity of identification of drivers was in some doubt. Photographic licenses help to resolve this problem. In addition, the state has a vital interest in ensuring that alcoholic beverages are not sold to minors who in turn may be operating motor vehicles on the streets and highways while impaired by the effects of alcohol.

The security of financial transactions also rises to the level of a compelling interest. The statutes cited earlier illustrate a concern with the misuse of financial instruments. Many such misuses could be prevented by accurate identification of the maker of the instrument, and operator's license are a frequently used form of identification for these transactions. As the photographic license serves a purpose of more accurate identification, it furthers a vital state interest.

I find that the state has shown at least two compelling state interests.

Having found that the state has demonstrated two compelling state interests, my inquiry must now turn to whether the means employed represents the least restrictive alternative in achieving that end. *Thomas v. Review Board,* supra, 450 U.S. at 718. I find that the denial of a nonphotographic license to the plaintiff does not represent the least restrictive means available to accomplish the stated objective of protecting the state's compelling interests.

In looking to whether the means employed is the least restrictive alternative available, I think it wise to take note of the quality of the state interest involved. In some cases, one exception to a requirement may be tantamount to a total usurpation of the means employed to serve the compelling state interest. In *Sherbert v. Verner,* supra, 374 U.S. at 409, the court noted that an exception to a Sunday closing law was of such a nature; there simply was no less restrictive means. In other cases, a single exception to the statutory requirement or a small number of exceptions may not have a significant effect on how the state is able to serve its compelling interests.

The exception requested in this case does not have a significant effect on the state's ability to serve its compelling interests. The plaintiff's license, or the licensees who are likely to seek a similar exception, will not represent a significant impact on the system. The several exceptions to the photographic requirement already in effect somewhat weaken the compelling nature of the state interest. The plaintiff has demonstrated herself to be a competent driver. The state has come forward with no evidence that this plaintiff represents a threat to pub-

lic safety or the security of financial transactions. Indeed, inferences to the contrary abound.

My holding in this case in no way compels the defendants to issue nonphotographic drivers' licenses upon demand by anyone. In the appropriate case the state may deny such a request, where there is a true danger to the public safety or security. I make no intimation as to what level these concerns must rise before a valid free exercise claim must yield in the face of the state interest.

III.

The plaintiff seeks declaratory and injunctive relief from the strictures of the statute and attorney's fees. Before an injunction may issue in a § 1983 action, the plaintiff must show that she will suffer irreparable injury. *Allee v. Medrano,* 416 U.S. 802 (1974). In turn, the question of irreparable injury contains as a corollary notions of the lack of an adequate remedy at law.

Given the facts of this case, I believe that the plaintiff does not have an adequate remedy at law and that an injunction should issue against the defendants. The nature and the extent of the plaintiff's injury because of her inability to obtain a valid driver's license is not of the type that can readily be recompensed with legal remedies. While some of the plaintiff's injuries may be compensable by a monetary award in some court, the chilling effect on her exercise of her First Amendment rights is the type of injury properly redressed by equitable relief. *Scoma v. Chicago Board of Education,* 391 F. Supp. 459 (U.S. D.C. N.D. Ill. 1974).

Accordingly, an injunction will issue prohibiting the defendants from refusing to issue the plaintiff a valid Nebraska driver's license because of her refusal on religious grounds to have a photograph taken of her and placed on the license. Entry of judgment will be withheld pending resolution of the matter of attorney's fees.

IT HEREBY IS ORDERED that the plaintiff is given ten days from the date of this order to submit affidavits or other materials concerning the attorney's fee and costs to be awarded; the defendants' counsel shall may respond within ten days thereafter.

Dated October 15, 1982

BY THE COURT

_____

Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1105

Frances J. Quaring,

Appellee,

v.

Harry "Pete" Peterson, Director of the Department of Motor Vehicles, State of Nebraska; William Edwards, Deputy Director of the Department of Motor Vehicles, State of Nebraska,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: October 10, 1983
Filed: March 1, 1984

Before BRIGHT, JOHN R. GIBSON, and FAGG, Circuit Judges.

BRIGHT, Circuit Judge.

Frances J. Quaring sought a Nebraska driver's license but refused to have her photograph taken and affixed to the license as required by Nebraska law. For this reason, Nebraska Department of Motor Vehicles officials Peterson and Edwards (Nebraska officials) refused Quaring's application for a driver's license. Quaring then brought suit against the Nebraska officials seeking to obtain a

court order requiring them to issue her a valid driver's license. She contended that her religious convictions prevented her from being photographed and that the refusal by the Nebraska officials to issue her a driver's license violated her first amendment right to the free exercise of her religion. The district court[1] agreed with Quaring's contention and enjoined the Nebraska officials from refusing to issue her a driver's license notwithstanding her refusal to be photographed.

The Nebraska officials bring this appeal, arguing that 1) the statute requiring driver's licenses to contain a photograph of the licensee does not burden Quaring's exercise of her religion, 2) that even if the photograph requirement burdens her religion, the state's interests outweigh that burden, 3) that no less restrictive alternative would adequately serve the state's interests, and 4) that excepting Quaring from the photograph requirement on the basis of her religion would violate the establishment clause. We reject these arguments, and affirm the district court.

I. *Background.*

Under Nebraska law, driver's licenses issued after January 1, 1978 must, with several exceptions,[2] contain a color photograph of the licensee. *See* Neb.Rev.Stat. § 60-

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[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

[2]The statute does not require photographs of the licensee on learner's permits, school permits, farm machinery permits, special permits for those with restricted or minimal driving ability, and temporary licenses for Nebraska residents who are outside Nebraska when their licenses expire. Neb.Rev.Stat. § 60-406.04 (Reissue 1978).

406.04 (Reissue 1978). Quaring meets the requirements for obtaining a driver's license except that she refuses to allow her photograph to appear on her license. For this reason, she has been unable to obtain a driver's license.

Quaring's refusal to have her photograph taken is based on religious convictions. She believes in a literal interpretation of the Second Commandment, which states:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

Exodus 20:4; Deuteronomy 5:8. Quaring believes that the Commandment is violated by creating a likeness of God's creation. Quaring's belief extends beyond her refusal to allow her photograph to appear on her driver's license. She believes the Second Commandment forbids her from possessing any image having a likeness of anything in creation. She possesses no photographs of her wedding or family, does not own a television set, and refuses to allow decorations in her home that depict flowers, animals, or other creations in nature. When she purchases foodstuffs displaying pictures on their labels, she either removes the label or obliterates the picture with a black marking pen.

Although Quaring is not a member of an organized church, she considers herself a Christian and attends a Pentecostal church in a nearby town with her family. She also participates in nondenominational Bible study groups. According to Quaring, Pentecostals do not share her belief that the Second Commandment forbids the making of photographs or images. Rather, her belief stems principally from her own study of the Bible.

After unsuccessfully attempting to obtain an exemption from the photograph requirement, Quaring brought suit against the director and deputy director of the Nebraska Department of Motor Vehicles under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, alleging a deprivation of her right to the free exercise of religion. The district court ruled that the state's photograph requirement, as applied, violates Quaring's right to the free exercise of religion, and ordered Nebraska officials to issue her a driver's license.

II. *Discussion.*

Quaring's exercise of her religious beliefs directly conflicts with Nebraska's requirement that driver's licenses contain a photograph of the licensee. Although the photograph requirement plainly serves a legitimate and important state interest, it may not be applied in a manner that unduly burdens Quaring's free exercise of her religion. *See Thomas v. Review Board,* 450 U.S. 707, 717, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1980). Before the state may refuse to issue Quaring a driver's license, "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder,* 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1971).

A. *Quaring's Religious Beliefs.*

As a threshold requirement, Quaring must demonstrate that her refusal to be photographed is grounded upon a sincerely held religious belief. *See Stevens v. Berger,* 428 F. Supp. 896, 899 (E.D.N.Y. 1977). Although

a religious belief requires something more than a purely secular philosophical or personal belief, *Wisconsin v. Yoder, supra,* 406 U.S. at 215-16, 92 S.Ct. at 1533-34, courts have approved an expansive definition of religion. *See United States v. Seeger,* 380 U.S. 163, 165-66, 85 S.Ct. 850, 853-54, 13 L.Ed.2d 733 (1965) (test is whether "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"); *see also International Society for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 440 (2d Cir. 1981); *Founding Church of Scientology v. United States,* 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969); *see generally* Freeman, *The Misguided Search for the Constitutional Definition of "Religion",* 71 Geo. L.J. 1519 (1983).

Quaring's beliefs, though unusual in the twentieth century, are religious in nature. The Second Commandment, the basis for her beliefs, expressly forbids the making of "any graven image or likeness" of anything in creation. Exodus 20:4; Deuteronomy 5:8. Quaring's refusal to allow herself to be photographed is simply her response to a literal interpretation of the Second Commandment, not unlike the response of the Old Order Amish to the Epistle of Paul to the Romans. In *Wisconsin v. Yoder, supra,* the Supreme Court noted that the daily life and religious practices of the Amish were a response to a literal interpretation of Paul's exhortation to "be not conformed to this world," and held that their refusal to send their children to school beyond the eighth grade was religious in nature. 406 U.S. at 216, 92 S.Ct. at 1533. *Cf. Stevens v. Berger, supra,* 428 F.Supp. at 902. Moreover, Quaring's literal interpretation of the Second Commandment

receives some support from historical and biblical tradition. At trial, Dr. John Turner, a professor of religious studies, testified that Quaring's beliefs can be analogized to the Hebrew concept that images of things in creation are an attempt to capture God and his creations, and that such an attempt is forbidden.[3]

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[3]In cases involving the religion clauses, courts sometimes cite authoritative works recognizing certain religious beliefs as supplemental evidence of the religious nature of a litigant's beliefs. *See, e.g., United States v. Seeger*, 380 U.S. 163 (1964); *Stevens v. Berger, supra*. Although the Nebraska officials do not seriously contest the sincerity and religious nature of Quaring's beliefs, we have briefly surveyed the literature discussing the Second Commandment's prohibition against the making of likenesses of God's creation.

The Commandments, including the Second Commandment, remain fundamental tenets of the Jewish (and the Christian) faith, as they were of the ancient Jewish faith, and within Judaism have been the subject of extensive interpretation and commentary. Some of that interpretation and commentary of the Second Commandment lends support to Quaring's personal interpretation. For example, included in early Hebrew religious beliefs were views prohibiting the reproduction of images:

> The Bible (ex. 20:4) forbade the "graven image" in the most explicit fashion, more categorically and comprehensively than the mere likeness. Hence, while the representation of human or animal figures on a plane surface was condoned or permitted most of the time during the periods in question, greater difficulties were constantly raised with regard to three-dimensional sculptures in the round. *Indeed, in some Orthodox circles, even making an impression with a seal bearing the human or animal form was considered religiously objectionable, since by doing so a man actually "made" a graven image, even though not for worship or veneration.* 14 Ency. Judaica 1059 (1971). (Emphasis added).

Even modern-day interpretation of Jewish law lends some support to views similar to Quaring's. Writing in a Hebrew-language publication, Rabbi Menashe Klein, Dean of Yeshiva Beth Shearim, Brooklyn, New York (a school for advanced Hebrew studies), argues that a person has a right to prevent

(Continued on following page)

Although members of the Pentecostal group with whom Quaring associates do not share her belief in a literal interpretation of the Second Commandment, that does not lessen the religious nature of her convictions. As the Supreme Court recently stated,

(The court expresses its appreciation to Professor Dov I. Frimer, Director, Institute of Jewish Law, Touro College School of Law, Huntington, New York, who supplied the court with the text and a translation of Rabbi Klein's Responsum.)

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow [adherent] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

(Continued from previous page)

others from taking his picture against his will. 7 RESPONSA MISHNE HALACHOTH § 114 (1977). Rabbi Klein observes that while the dominant position in Jewish law, as well as custom and practice, permits the photographing of human beings, an authortative, albeit minority, position prohibits photographs of humans, especially of the face. To support his position, Rabbi Klein cites the work of the noted Polish authority Rabbi Malkiel Zevi Halevi Tennenbaum, who in 3 RESPONSA DIVREI MALKI'EL § 58 (1897), opines that the taking of pictures violates the Second Commandment. Rabbi Klein also cites the work of the German scholar Rabbi Jacob Emden (1697-1776) in 1 RESPONSA SHE'ELAT YAVEZ § 170, who reports that his father, Rabbi Zevi Hirsch Ashkenazi, Chief Rabbi of Hamburg and later of Amsterdam, opposed any portraits of himself. Rabbi Klein concludes therefore, in his 1977 Responsum that one who, out of sincerity and piety, wishes to conduct himself in accordance with this stringent view of the Second Commandment may do so. Accordingly, others must respect that person's freedom of religious expression and refrain from taking his photograph against his wishes.

Thomas v. Review Board, supra, 450 U.S. at 715-16, 101 S.Ct. at 1430-31. Although Quaring's beliefs might seem unreasonably doctrinaire to many, that "does not mean that they can be made suspect before the law." *United States v. Ballard,* 322 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1943).

It is also clear that Quaring sincerely holds her religious beliefs. As the district court observed,

> At trial [Quaring] appeared ready to support her interpretation of the Bible, based on her knowledge of several portions of the Old Testament. In addition, [her] behavior in every way conforms to the prohibition as she understands it: her home contains no photographs, television, paintings, or floral-designed furnishings, and, as she testified, she goes so far as to remove or obliterate pictures on food containers.

Because Quaring's beliefs are based on a passage from scripture, receive some support from historical and biblical tradition, and play a central role in her daily life, they must be characterized as sincerely held religious beliefs.

B. *The Burden on Quaring's Religion.*

Having examined the religious nature and sincerity of Quaring's beliefs, we next turn to the question whether Nebraska's photograph requirement infringes upon those beliefs. Although the Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience, the Supreme Court has noted that "this is only the beginning, not the end, of our inquiry." *See Sherbert v. Verner,* 374 U.S. 398, 403-04, 83 S.Ct. 1790, 1793-40, 10 L.Ed.2d 965 (1963). Under the proper analysis, a burden upon religion exists when "the state conditions receipt of an important benefit

upon conduct proscribed by a religious faith, * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Board, supra,* 450 U.S. at 717-718, 101 S.Ct. at 1431-32.

Clearly, a burden upon Quaring's free exercise of her religion exists in this case. The state refuses to issue Quaring a driver's license unless she agrees to allow her photograph to appear on the license, a condition that would violate a fundamental precept of her religion. Moreover, in refusing to issue Quaring a driver's license, the state withholds from her an important benefit. Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

The burden on Quaring is indistinguishable from the burden placed upon a Sabbatarian by the state in *Sherbert v. Verner, supra.* In that case, the Supreme Court held that in denying unemployment benefits to a member of the Seventh-Day Adventist Church who refused to work on Saturdays, the Sabbath of her faith, the state violated her right to the free exercise of religion. 374 U.S. at 402, 83 S.Ct. at 1792. Assessing the burden on the denial of benefits on the Sabbatarian's exercise of her religion, the Court commented,

> The [denial] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of

> her religion [not working on Saturdays] in order to accept work, on the other hand.

Id. at 404, 83 S.Ct. at 1794. Similarly, Nebraska's photograph requirement puts Quaring to the choice of following an important precept of her religion or foregoing the important privilege of driving a car.

C. *Balancing the State's Interest Against the Burden on Religion.*

Although Nebraska's photograph requirement burdens Quaring's exercise of her religious beliefs, that does not in itself entitle her to an exemption. Not all burdens upon religion violate the free exercise clause. *See, United States v. Lee,* 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1981). The state may justify a limitation on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest. *Thomas v. Review Board, supra,* 450 U.S. at 718, 101 S.Ct. at 1432. In articulating the standard the state must meet, the Supreme Court has said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder, supra,* 406 U.S. at 215, 92 S.Ct. at 1533.

The Nebraska officials argue that Quaring's interest in exercising her religion must be subordinated to the state's more compelling interest in requiring that driver's licenses contain a photograph of the licensee. In weighing the competing interests, we examine not only the substantial state interests that the photograph requirement generally serves, bu also whether an exemption to the requirement would impair the state's ability to achieve its objective. *Wisconsin v. Yoder, supra,* 406 U.S. at 221, 925

S.Ct. at 1536; *see also United States v. Lee, supra,* 455 U.S. at 259, 102 S.Ct. at 1056 (court must inquire whether accommodating exercise of religion will unduly interfere with fulfillment of government interest); L. Tribe, American Constitutional Law § 14-10, at 855 (1978) (crucial issue in free exercise cases is state's interest in denying exemption, not in maintaining underlying rule or program). To prevail, the Nebraska officials must demonstrate that their refusal to exempt Quaring from the photograph requirement serves a compelling state innterest.[4]

In justifying their refusal to grant Quaring an exemption to the photograph requirement, the Nebraska officials advance several state interests. First, they point out that by ensuring that only persons with valid driver's licenses operate motor vehicles, the state promotes a compelling interest in public safety. *Cf. Delaware v. Prouse,* 440 U.S. 648, 659, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 5-660 (1979). They contend that only driver's licenses containing a photograph of the licensee can provide police officials with an accurate and instantaneous means of identifying a motorist. For this reason, at least 47 states require photographs of the licensee to appear on driver's licenses.[5] The

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[4]Three courts have considered claims by licensees who objected on religious grounds to similar photograph requirements. Two courts ruled that the state's refusal to exempt the objecting licensees served a compelling state interest. *See Dennis v. Charnes,* 571 F. Supp. 462 (D.Colo. 1983); *Johnson v. Motor Vehicle Div.,* 593 P.2d 1363 (Colo. 1979), and one court ruled that such a refusal does not serve a compelling state interest. *See Bureau of Motor Vehicles v. Pentecostal House,* 380 N.E.2d 1225 (Ind. 1978).

[5]Notably, however, one of the Nation's most populous states, New York, does not require photographs on driver's licenses.

Nebraska officials contend that an exemption to the photograph requirement would undermine the state's interest in ensuring that only licensed motorists drive on its roads.

Although quick and accurate identification of motorists surely constitutes an important state interest, we disagree wih the Nebraska officials' contention that the state's interest is so compelling as to prohibit selective exemptions to the photograph requirement. Indeed, Nebraska law already exempts numerous motorists from having a personal photograph on their license. At trial, the associate director of the Department of Motor Vehicles testified that photographs of the licensee are not required on learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired. In addition, motorists licensed in the few states that do not require photograph licenses presumably drive through Nebraska on occasion, and those persons would be unable to present driver's licenses containing their photographs. Because the state already allows numerous exemptions to the photograph requirement, the Nebraska officials' argument that denying Quaring an exemption serves a compelling state interest is without substantial merit.

The Nebraska officials also argue that the state's compelling interest is ensuring the security of financial transactions justifies their refusal to exempt Quaring from the photograph requirement. Again, we disagree. Although a photograph license obviously serves an important state interest in facilitating the identification of persons writing checks or using credit cards, granting Quar-

ing an exemption will not undermine that interest. Many people already engage in financial transactions without the benefit of a photograph license for identification: some are exempt from the photograph requirement, and some do not have any license because they do not drive. Issuing Quaring a license without her photograph places her in the same position as these people. In any event, the state may still achieve its interest in ensuring the security of financial transactions because people may freely refuse to do business with Quaring if she is unable to present adequate identification.

Finally, the Nebraska officials argue that the administrative burden of considering applications for exemptions from the photograph requirement also constitutes a compelling state interest. They point out that establishing uniform criteria for granting exemptions will be difficult because 95 testing centers in Nebraska issue driver's licenses. They also argue that the religious nature of the claimed exemption will exacerbate this problem. The state would have to probe into the sincerity and religious nature of an applicant's belief, and applicants could easily show religious grounds as the basis for their objection to the photograph requirement. The Nebraska officials fear that unless the state establishes an elaborate and expensive mechanism to consider requests for religious exemptions, exemptions to the photograph requirement will be available virtually on demand.

Although Nebraska plainly has an interest in avoiding the administratively cumbersome task of considering applications for religious exemptions, its interest is not compelling. A state's interest in avoiding an administrative burden becomes compelling only when it presents adminis-

trative problems of such magnitude as to render the entire statutory scheme unworkable. *See Sherbert v. Verner, supra,* 374 U.S. at 408-09, 835 S.Ct. at 1796-97. The record contains no evidence, however, that allowing religious exemptions to the photograph requirement will jeopardize the state's interest in administrative efficiency. Persons seeking an exemption from the photograph requirement on religious grounds are likely to be few in number. Indeed, few persons will be able to demonstrate the sincerity of their religious beliefs by showing that they possess no photographs or pictures. Furthermore, the few persons who make legitimate requests for exemptions from the photograph requirement will cause the Nebraska officials little inconvenience. Because persons requesting an exemption for religious beliefs based on the Second Commandment can easily demonstrate the sincerity and valid nature of their belief as Ms. Quaring offered to do, the state need not be greatly burdened by requests for an exemption. At least on this record, the Nebraska officials have not demonstrated that giving an exemption for photographs to Quaring and others holding similar beliefs will cause any undue administrative burden. Thus, none of the interests the Nebraska officials advance are sufficient to justify the burden upon Quaring's religious liberty.

D. *Establishment of Religion.*

The Nebraska officials argue that providing an exemption for Quaring on the basis of her religion creates an impermissible establishment of religion. We disagree. In some cases, the free exercise clause requires a state to make a reasonable accommodation of religion. *See O'Hair v. Andrus,* 613 F.2d 931, 935 (D.C. Cir. 1979).

Such accommodation does not constitute an establishment of religion. *See Thomas v. Review Board, supra*, 450 U.S. at 719-20, 101 S.Ct. at 1432-33; *Sherbert v. Verner, supra*, 374 U.S. at 409, 835 S.Ct. at 1796.

III. *Conclusion.*

Accordingly, for the reason set forth in this opinion, we affirm the district court's issuance of an injunction requiring the Nebraska officials to issue Quaring a driver's license without requiring her to be photographed.

FAGG, Circuit Judge, dissenting.

I respectfully dissent. The interest advanced by the state statute is, in my opinion, of sufficient magnitude to justify an indirect burden on Quaring's free exercise of religion. The majority, while recognizing that a photographic license requirement "plainly serves a legitimate and important state interest," concludes that granting Quaring special dispensation from the requirement will not unduly hinder the state's accomplishment of its legitimate objective. I cannot agree.

Nebraska's photographic license requirement advances the state's interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violation or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of 50 states require a photographic driver's license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state's compelling interest in "quick and accurate identification of motorists." Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting "selective exceptions" to the state's requirement would impair the state's ability to achieve its objective. This approach simply ignores or casts aside the state's legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring's religious practice by issuance of a driver's license lacking a photographic identifier would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee*, 455 U.S. 252, 259 (1982). "The ready certainty inherent in photographic identification would be lost." *Johnson v. Motor Vehicle Division*, 593 P.2d 1363, 1365 (Colo. 1979). To downplay the impact of granting selective exemptions to regular license holders, the majority attaches significance to the fact that Nebraska exempts certain categories of permittees and temporary licensees from the photograph requirement; however, the limitations placed upon these provisional operators deny any meaningful comparison with the state's regular license holders.

I have no quarrel with the majority's observation that Quaring may experience daily inconvenience because she cannot drive a motor vehicle. Her difficulties, however, are not insurmountable and she is not the only person that has been faced with the need to make life-style adjustments precipitated by nonconformity with driver's license requirements. Not insignificantly, and as the majority notes, Quaring's religious beliefs are "unusual in the twentieth century" and "the photographic require-

ment in no way compels Quaring to act in violation of her conscience." I cannot say that the state's legitimate requirement of a photographic identifier has placed impermissible pressure on Quaring to modify her behavior and violate her beliefs to the end of obtaining driving privileges upon the roadways of Nebraska.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. • • • Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in • • • disadvantage to some religious sects • • •." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). In my view the state's compelling interest in having a photographic verification of identifying upon its driver's licenses outweighs the incidental burden on Quaring's free exercise of religion. This is an instance where a religious belief must yield to the common good. I would reverse.

APPENDIX C

NEB.REV.STAT. §60-406.04 (Supp. 1982)

60-406.04. Operator's licenses; color photograph affixed; procedure; costs; temporary motor vehicle operator's permits; when issued; fee; period valid; renewal.

(1) All motor vehicle operator's licenses except limited, special, learners', temporary as provided by subsections (2) and (3) of this section and subsection (4) of section 60-415, or school permits issued in the states after January 1, 1978, shall have a color photograph of the licensee affixed thereto. Such license shall be issued by the county treasurer either in person or by mail. The Director of Motor Vehicles shall negotiate and enter into a contract to provide the necessary equipment, supplies, and forms for the photographs. All costs incurred by the department under this section shall be paid by the state out of appropriations made to the Department of Motor Vehicles. All costs of taking and affixing the photographs shall be paid by the county from the fees provided pursuant to section 60-409.

(2) Any person who, at the time of renewal of his or her motor vehicle operator's license, is out of the state, but within the United States, may apply for a Class I temporary motor vehicle operator's permit. Such application shall be made to the county treasurer of the county in which the applicant resides. Upon being satisfied that such application is in proper form, the county treasurer shall issue, upon the payment of a fee of two dollars, a temporary motor vehicle operator's permit. The temporary permit shall be valid for no longer than three months from the date of expiration of the individual's motor ve-

hicle operator's license, except that a person who is out of the state continually for more than three months may apply for an extension of the temporary permit for up to three additional three-month periods at no charge.

(3) Any person who, at the time of renewal of his or her motor vehicle operator's license, is temporarily residing in a foreign country, may apply for a Class II temporary motor vehicle operator's permit. Such application shall be made to the county treasurer of the county in which the applicant resides. Upon being satisfied that such application is in proper form, the county treasurer shall issue, upon the payment of a fee of two dollars, a temporary motor vehicle operator's permit. The temporary permit shall be valid for no longer than one year from the date of expiration of the individual's motor vehicle operator's license. A person who is out of the United States continually for more than one year may apply for an extension of such temporary permit for up to three additional one-year periods at no charge.

(4) Any person possessing a permit pursuant to subsection (2) of this section on March 25, 1982, may apply for renewal of such temporary permit as provided in subsection (3) of this section.

No. 83-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOLLY JENSEN, Director, and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Petitioners,

—vs.—

FRANCES J. QUARING,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the State of Nebraska's refusal to grant Respondent's request for a religious exemption to the statutory requirement that drivers' licenses contain photographs of the licensee infringed upon the Respondent's First Amendment right to freely exercise her religious beliefs?

2. Was the court of appeals correct in holding that the State of Nebraska's interest in identification of licensed drivers may be adequately served in the circumstances presented by the Respondent's First Amendment claims by alternative measures less restrictive of the Respondent's right to freely exercise her religious beliefs?

3. Was the court of appeals correct in holding that requiring the State of Nebraska to make a reasonable accommodation of the Respondent's religious beliefs does not constitute an establishment of religion?

PARTIES

Petitioners Holly Jensen and William J. Edwards are the director and deputy director, respectively, of the Nebraska Department of Motor Vehicles. The department is the state agency responsible for the administration of Nebraska's motor vehicle operator's licensing program.

Respondent Frances J. Quaring is a resident of rural Shelton, Nebraska, qualified by age and testing results to receive a Nebraska driver's license.

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Other Authorities Cited

STATEMENT OF THE CASE

This case concerns the denial by the State of Nebraska and its officials of the Respondent's application for a valid Nebraska motor vehicle operator's license. Respondent Mrs. Frances J. Quaring was refused a driver's license because her religious beliefs do not allow her to submit herself to being photographed. Nebraska officials would not voluntarily grant Mrs. Quaring an exemption to the statutory requirement that a photograph of the licensee be affixed to most Nebraska drivers' licenses. See, Neb. Rev. Stat. §60-406.04 (Cum. Supp. 1982). This litigation then ensued pursuant to 28 U.S.C. §1343, and 42 U.S.C. §1983.

Frances J. Quaring is an adult, female resident of the State of Nebraska who lives with her husband and son on their family farm near Shelton, Nebraska. In addition to her

participation in the farming operation, Mrs. Quaring is also a part-time bookkeeper for a business in nearby Gibbon, Nebraska.

Mrs. Quaring had met every requirement for the issuance of a Nebraska motor vehicle operator's license, but the Petitioners refused to issue such a license to her because she refused to allow her photograph to be taken for use on the license as required by the Nebraska statute. The basis for Mrs. Quaring's objection to having herself photographed for any purpose is her sincerely-held religious belief in a literal interpretation of the Second Commandment. Mrs. Quaring made numerous attempts, through both legislative and administrative State officials, to obtain an exemption from the photograph requirement, but her request for an exemption was ultimately denied.

Mrs. Quaring's belief concerning the

Second Commandment results from her own self-study of the Bible in which she engaged after a family tragedy. Because of her exercise of this belief, she has no photographs of her only son, no television set, no decorations in her home reflecting nature or floral designs. Further, Mrs. Quaring removes labels from foodstuffs which she purchases for her family if those labels bear pictures of the contents of the package. She possesses no likeness of anything in creation.

Mrs. Quaring testified that she would consider it to be a violation of her religious beliefs if she allowed herself to be photographed. She stated that the circumstances surrounding her driver's license application placed her in a situation in which she was being forced to choose between her belief in the Second Commandment, on the

one hand, and being able to obtain the license, on the other hand.

At the time of the trial, Mrs. Quaring had been driving motor vehicles for 20 years. She had never received a traffic citation, or been charged with a law violation of any kind. During those 20 years, she had been requested to display her driver's license to a law enforement officer only once.

Mrs. Quaring's religious beliefs are Christian in nature and are based on the view that the Bible is the word of God which contains statements of God's will for her life. The Petitioners now concede that Mrs. Quaring's belief is religious in nature and is sincerely held.

The chief examiner for the driver's license division of the Nebraska Department of Motor Vehicles testified at trial that a driver's licensing program which included a

photograph exemption would require no change in the department's examination or application. The department files in the central office in Lincoln, Nebraska, do not contain copies or negatives of the photographs contained on licenses issued.

The associate director of the driver's services division of the Nebraska Department of Motor Vehicles testified at trial that there currently exist several types of licenses which are exempt from the photograph requirement, including school permits, limited special permits, learner's permits, and temporary permits. He further stated that it was the current practice for requests for any exemptions to licensing requirements to be reviewed and ruled upon in the central department office--not by the various county treasurers, who are the agents issuing the licenses. He stated that there had been only

one or two requests for photograph exemptions, including Mrs. Quaring's. He also stated that it would be possible to develop an administrative form, or an addendum to the current form, to address requests for photograph exemptions. The current driver's license form contains notations for the physical attributes or description of the licensee.

The superintendent of the Nebraska State patrol testified as to the identification purposes served the driver's license photograph. He also testified that there are a large number of drivers on Nebraska's highways who do not have photographic licenses because of the various exemptions noted above.

The district court found that the Petitioners had established two compelling interests in the photographic driver's license---identification served the interest

of public safety and the interest of security of financial transactions. However, the district court also found that, with respect to Mrs. Quaring's claim of interference with the free exercise of her religious beliefs, the photographic license is not the least restrictive alternative available to the Petitioners to serve these interests. The district court enjoined the Petitioners from refusing to grant Mrs. Quaring a non-photographic license.

The court of appeals affirmed the judgment rendered by the district court. Both the district court and the court of appeals rejected Petitioners' argument that granting the exemption requested by Mrs. Quaring would contravene the Establishment Clause.

REASONS WHY THE WRIT SHOULD BE DENIED

None of the considerations enumerated in this Court's Rule 17 are present in this case so as to compel the Court to grant the writ of certiorari sought by the Petitioners.

A. Conflicts Among the Lower Courts

The eighth circuit court of appeals' carefully considered decision presents no conflicts with the holdings of any other federal court of appeals. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), is the only decision by a federal court of appeals to have considered the Free Exercise Clause issues raised by the Petitioners' initial refusal to grant Mrs. Quaring a non-photographic driver's license. The court of appeals' opinion is consistent with the decisions of this Court and is firmly anchored in the settled doctrine established by those decisions. Reversal would compel this Court to severly restrict the scope of its earlier

holdings in cases such as Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981). The statements of this Court in those decisions in no way indicate an intention to confine their holdings to the limited factual context of denial of unemployment compensation benefits which both cases presented. Rather, in both Sherbert and Thomas this Court spoke of government privileges and benefits generally and declared firmly that religious liberty may not be impaired by governmental denial of such privileges based solely upon religious disqualifications. Sherbert, 374 U.S. at 404.

It is true that the court of appeals' decision appears to be in conflict with one decision of a state court of last resort. See, Johnson v. Motor Vehicle Division, 197

Colo. 455, 593 P.2d 1363, cert. denied, 444 U.S. 885 (1979). However, there are at least two factors which argue against granting a writ of certiorari in the instant case on the basis of its conflict in result from that reached in Johnson. First, Johnson, is distinguishable on its facts from the instant case. The Colorado licensing statute questioned in Johnson established an extensive state identification system complete with negative retrieval capabilities. By contrast, the Nebraska "system" simply requires the photograph on a driver's license and does not contemplate any wider identification scheme. Because of that difference, the quality of the state interests involved in these two respective cases is different and this apparent "conflict" in decisions is not significant enough to merit an exercise of this Court's discretion on

certiorari.

Second, the court of appeals' decision is completely consistent with that of another state court of last resort. In Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E. 2d 1225 (1978), the Indiana court returned a decision in which its holding on the Free Exercise Clause issue is virtually identical to that in the instant case. In addition to its consistency with the instant case, Bureau of Motor Vehicles is important to the considerations governing review on certiorari in the instant case because it is a decision which pre-dates Johnson. This Court denied certiorari in Johnson, then, fully aware that a conflict existed on the Free Exercise Clause issues presented in these cases between the courts of last resort in two different states. This Court did not view that

conflict as justification for granting the writ in Johnson, and a similar view should be taken here.

B. The Importance of This Case Is Limited to Its Parties

While this case is extremely important to Mrs. Quaring as she attempts to exercise her religious beliefs and still have access to the driving privileges available to every other Nebraskan who meets the age and driving requirements for a license, its importance really is limited to Mrs. Quaring and the Nebraska officials who would block her from receiving a license solely because she will not allow herself to be photographed. The court of appeals followed the precedents of this Court. The decision of the court below is not an extension of the Free Exercise Clause doctrine established by this Court. Rather, it is completely consistent with, and

compelled by, this Court's long line of decisions on this issue.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT MRS. QUARING'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE HER RELIGIOUS BELIEF IS BURDENED BY THE REQUIREMENT THAT SHE SUBMIT TO BEING PHOTOGRAPHED IN ORDER TO RECEIVE A DRIVER'S LICENSE.

Mrs. Quaring sincerely holds a deep religious belief in a literal interpretation of the Second Commandment which reads as follows:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

The Bible, Exodus 20:4, see also Deuteronomy 5:8. It is her sincerely-held religious belief that the proper interpretation of the Second Commandment precludes her from allowing herself to be photographed; since,

in her view, photographs are the modern-day equivalent of the graven images which the Commandment forbids.

Mrs. Quaring's beliefs about photographic images come into direct conflict with Nebraska motor vehicle operator's licensing statutes. The basis of the Petitioners' refusal to issue Mrs. Quaring a new driver's license is the requirement of Neb. Rev. Stat. §60-406.04 (Cum. Supp. 1982) that all such licenses must have affixed to them a color photograph of the licensee.

The two state court cases which have previously addressed the exact same issue presented here have both found that the driver's license photograph requirement infringes upon the First Amendment rights of those who believe, as Mrs. Quaring does, that the Second Commandment forbids the photographing of anything in God's creation.

See, Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363, 1364 (1979), cert. den., 444 U.S. 885 (1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E. 2d 1225, 1226-27 (1978). It is true that these two courts reached opposite results with regard to whether the licensing statute involved in each could withstand constitutional attack. However, both the Colorado court and the Indiana court agreed that the state in each instance was required to show that some compelling state interest was being served by the license photograph. Johnson, supra, 593 P.2d at 1364; Bureau of Motor Vehicles, supra, 380 N.E. 2d at 1227. Colorado held that the photograph requirement was justified by a compelling state interest in identification; Indiana did not, holding instead that any interest in identification can be satisfied

through some alternative means less restrictive of the First Amendment rights involved. It should be noted that the identification system established under the questioned Colorado statute was much more extensive than Nebraska's, with multiple state purposes served in Colorado by a negative retrieval system. See also, Dennis v. Charnes, 571 F.Supp. 462 (D. Colo. 1983), following Johnson.

The Petitioners, in their argument (Pet. 7, 10, 12, 14, 15), have attempted to characterize the harm to Mrs. Quaring as the loss or limitation of her driving privileges. Such an argument is either a misstatement or a misunderstanding of the law governing this case.

The harm being suffered by Mrs. Quaring is not an infringement of her driving privileges. The Respondent cannot be more empha-

tic about this point. The argument to the contrary by the Petitioners ignores the statements of this Court that:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Sherbert v. Verner, 374 U.S. 398, 404 (1963). In fact, most of the leading cases on the Free Exercise Clause have involved the denial of some benefit or privilege because of religious disqualification, e.g., Sherbert, supra; Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).

In Cantwell v. Connecticut, 310 U.S. 296, (1940), this Court held that the First Amendment embraces the freedom to act as well as the freedom to believe. This decision marked the abandonment of the belief-action distinction that had characterized some of

the Court's earlier decisions. See, e.g., Reynolds v. United States, 98 U.S. 145 166 (1878). Cantwell represents a significant step toward greater protection for religious acts under the Free Exercise Clause. It is true that, under the proper circumstances, religious actions may be regulated or prohibited. But that may occur only where the governmental interests advanced are of compelling importance and where those interests cannot be served by some means less restrictive of religious freedom. This is not such a case.

In Sherbert v. Verner, supra, the balancing test was reaffirmed, but this Court altered it in a manner that has great significance to the analysis of Free Exercise Clause claims. In Sherbert, this Court shifted the presumption of validity to the religious practice or interest asserted, and

away from the state law or regulation.

Sherbert dealt with a South Carolina statute which predicated unemployment compensation on the availability for work when offered. Mrs. Sherbert, a member of the Seventh Day Adventist Church, was denied such benefits when she refused to take available Saturday work because of her religious convictions. Mr. Justice Brennan, writing for the majority, noted at 374 U.S. 398, 403, 407:

> "If therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' N. A. A. C. P. v. Button, 371 U.S. 415, 438, 9 LEd. 2d 405, 421."

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses endangering paramount interests, give occasion for permissible limitation.' Thomas v. Collins, 323 U.S. 526, 520, 89 L.Ed. 430, 440."

The balancing test which the Sherbert Court applied extended the protection of Free Exercise claims and shifted to the State the burden of proving endangered governmental interests of much greater extent than what had been previously required. In Sherbert, the statute was invalidated as to Mrs. Sherbert, although it posed merely an indirect burden on her religious liberty, since no religious action was specifically prohibited.

This Court reaffirmed and strengthened the Sherbert analysis in Wisconsin v. Yoder, 406 U.S. 204 (1972), when it struck down a

compulsory education law as applied to the Amish, who feared that a high school education would alienate their children from God. Mr. Chief Justice Burger, writing for the majority stated that the Amish rejection of worldly influences and outside contacts was religiously mandated and that their deep conviction to their unique lifestyle was, in fact, religious expression. In Yoder, this Court ultimately reasoned that although the state's interest in compulsory education was compelling, it was not so absolute as to justify infringement on the Amish way of life.

More recently, in United States v. Lee, 455 U.S. 252 (1982), this Court applied this same balancing test in considering another Free Exercise claim advanced by an adherent of the Old Order Amish faith and lifestyle. In Lee, the question was whether the Free

Exercise Clause required the government to grant an exemption to the requirement that employers withhold social security taxes from exmployees' wages , pay the employer's share of social security taxes, and file the required social security tax returns. The exemption had been sought on the basis that the social security system interfered with the Free Exercise rights of the Amish who object on religious grounds to the receipt of public insurance benefits.

In holding that the Free Exercise Clause does not compel the exemption from social security tax obligations sought by Lee, this Court adhered to the analytical approach and balancing test articulated in Sherbert, supra. Neither the analysis nor the result in Lee is in any way inconsistent with that reached by the court of appeals in the instant case. The result in Lee that accom-

modation of a belief which requires its adherents to refrain from paying certain taxes is not mandated by the Free Exercise Clause was reached because this Court concluded that the broad and compelling governmental interest in maintaining a sound tax system could not be achieved if exemptions from payment of taxes were granted on the basis of religious beliefs. The holding in Lee is reflective of this Court's historical approach to Free Exercise claims which threaten uniformity in the operation of tax systems, see, e.g., Follett v. Town of McCormick, 321 U.S. 573 (1944), or in the application of otherwise reasonable regulations to commercial activity, Braunfeld v. Brown, 366 U.S. 599 (1961).

The holding of the court below is consistent with that of Lee. The analysis of the issues presented in the court of appeals

is identical to that applied by this Court in Lee. The difference in result arises from the inquiry in each case concerning whether a religiously-based exemption to an otherwise uniform requirement would unduly interfere with the government's ability to achieve the interests and objectives of the program in question. In Lee, this Court concluded that such an exemption would threaten the viability of the tax system. 455 U.S. at 259-261. In the instant case, the eighth circuit court of appeals concluded that the interests served by photographic drivers's licenses would not be unduly threatened or thwarted by the exemption sought by Mrs. Quaring.

As noted above, the Petitioners' attempt to obscure the First Amendment claim of the Respondent by focussing on drivers' licenses as a privilege to which there is no fundamental right (Pet. 14, 15), misstates the issue

and such obfuscation must not be allowed to misdirect this Court's consideration of the petition. It is not an infringement of her driving privileges of which Mrs. Quaring complains. Rather, the harm being suffered by Mrs. Quaring is the infringement of her First Amendment right to freely exercise her religion. By requiring her to submit to being photographed before receiving a current driver's license, the Petitioners would require Mrs. Quaring to choose between following an important precept of her religion and forfeiting the important governmental privilege of driving a motor vehicle, on the one hand, and abandoning one of the precepts of her faith in order to obtain a driver's license, on the other hand. Forcing her to make such a choice is a violation of her First Amendment rights. Sherbert, supra, at 404; Thomas, supra at 717-18. Both the

district court and the court of appeals recognized this in their findings and holdings. Those findings and holdings are supported by both the law and the evidence in this particular case. They are correct and require no further review.

II. THE COURTS BELOW CORRECTLY FOUND THAT THE STATE'S COMPELLING INTERESTS IN REQUIRING PHOTOGRAPHIC DRIVER'S LICENSES COULD BE SERVED BY ALTERNATIVE MEANS LESS RESTRICTIVE OF MRS. QUARING'S RIGHT TO FREELY EXERCISE HER RELIGIOUS BELIEF.

The district court found that the driver's license photograph served two compelling state interests: (1) adequate regulation and identification of persons driving on Nebraska highways, and (2) furthering the security of financial transactions, (Pet.,App. 7-8). Although the Respondent would argue that there is serious legal question about whether such state interests

are compelling within the context of constitutional analysis, see, Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 125 (1978), and Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), Pet., App. 27-29, the fact is that, compelling or not, these interests can be served by means less restrictive than an absolute denial of any exemption to the photograph requirement. The Constitution requires an inquiry into whether the means employed to serve the government's interests represents the least restrictive alternative for achieving the desired end. Thomas v. Review Board, 450 U.S. at 718.

In the instant case, the record reflects that the administrative machinery already is in place for the procedures required by the accommodation granted to Mrs. Quaring's religious belief. There simply would be no

significant administrative burden created by the district court's decision requiring such accommodation. At most, the Department of Motor Vehicles may have to devise a form upon which persons desiring a photograph exemption could make application. The state central licensing office is already in daily contact with licensing stations, and procedural directives are issued from the central office to county treasurers on a regular basis. Following the entry of the district court's judgment, the Department of Motor Vehicles arranged for Buffalo County, Nebraska, officials to isue a non-photographic license to Mrs. Quaring. Only administrative inconvenience which renders an entire statutory scheme unworkable will be sufficient to prevent the implementation of a less restrictive alternative when such an alternative will not threaten the state interests underlying the

statute. Sherbert v. Verner, 374 U.S. at 409.

The Minnesota Supreme Court was presented with an analogous situation in In re Jenison, 265 Minn. 96, 120 N.W.2d 515, vacted and remanded, 375 U.S. 14, on remand, 267 Minn. 136, 125 N.W.2d 588 (1963). Jenison involved a claim of a religiously-based exemption from jury duty. In its first opinion, the Minnesota court held that such an exemption would present administrative difficulties of the same sort asserted by the Petitioners in the instant case. This Court vacated that decision and remanded the case for further consideration in light of Sherbert, supra. On remand, the Minnesota court, properly following the analysis articulated in Sherbert, held that there had been an inadequate showing by the State that the requested exemption would result in an inabi-

lity to obtain competent jurors. The court said:

> Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt.

Jenison, supra, 125 N.W. 2d at 589. It is likewise clear from the record in the instant case--as the court of appeals correctly decided--that the exemption sought by Mrs. Quaring will not create an administrative burden which will render Nebraska's drivers' licensing program unworkable.

In addition to the absence of any administrative burden created by the accommodation of Mrs. Quaring's belief, such accommodation presents no significant threat to the State's ability to serve its compelling interests. The minimal number of people, in addition to Mrs. Quaring, who may

request such an exemption, will not have any significant impact on the identification system. Indeed, the few persons who may seek such an exemption would represent a minuscule percentage of the large pool of drivers on Nebraska highways who are already driving with the various types of permits which are statutorily exempt from the photograph requirement.

With regard to the other state interest found by the lower courts, there has been no showing whatever that Mrs. Quaring represents any threat to the security of financial transactions. Concerning check cashing and other such financial transactions, if anyone is inconvenienced or handicapped by the accommodation granted below, it is the person issued a non-photographic license. Merchants are free to demand whatever identification they deem appropriate and sufficient when their

customers seek to cash checks. If merchants demand photographic identification documents, it is the person without the photograph who is at a disadvantage--not the merchant, and certainly not the State since, if the transaction does not take place, the State has no interest at all.

III. NO VIOLATION OF THE ESTABLISHMENT CLAUSE OCCURS IF NEBRASKA OFFICIALS ARE REQUIRED TO GRANT MRS. QUARING AN EXEMPTION FROM THE PHOTOGRAPH REQUIREMENT OR IF THOSE OFFICIALS ARE REQUIRED TO ESTABLISH CRITERIA ON WHICH TO BASE GRANTS OR DENIALS OF EXEMPTIONS TO THE PHOTOGRAPH REQUIREMENT.

The Petitioners argue that the photograph exemption granted Mrs. Quaring by the courts below violates the Establishment Clause. The court of appeals was correct in holding that such accommodation of religion in this case does not constitute establishment of religion.

In order to withstand challenges arising

under the Establishment Clause, a governmental practice must (1) have a secular legislative purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The exemption granted Mrs. Quaring is consistent with either the Lemon test or with the "contextual" analysis employed by this Court in Lynch v. Donnelly, __U.S.__, 104 S.Ct. 1355 (1984).

The exemption here has the secular purpose of securing Mrs. Quaring's free exercise of religious rights; its primary effect in no way advances her religion since it arises in the first place because of a religious disqualification imposed by the government and merely restores her to a status equal to other citizens; it does not foster governmen-

tal entanglement with Mrs. Quaring's belief.

If viewed from the perspective of the context in which the Free Exercise Clause claim arises, it also is clear that an accommodation of the belief at issue here does not establish a governmental preference for Mrs. Quaring's belief. There is neither participation by the government in Mrs. Quaring's belief, nor is there a governmental endorsement of the belief under the judgments of the lower courts. By granting Mrs. Quaring a non-photographic driver's license, the government is merely recognizing the validity of her assertion that her personal attempts to live a life consistent with her beliefs are shielded from governmental interference--direct or indirect--by the Free Exercise Clause. See, also, Marsh v. Chambers, --U.S.--, 103 S.Ct. 3330 (1983).

CONCLUSION

For all of the foregoing reasons,

certiorari should be denied.

Respectfully submitted,

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July 29, 1984

No. 83-1944

In The

Supreme Court of the United States

October Term, 1984

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles, State of Nebraska

Petitioners,

vs.

FRANCES J. QUARING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 26, 1984.
CERTIORARI GRANTED OCTOBER 1, 1984.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

18 pp

INDEX

The following opinions, orders and statutes have been omitted in printing this appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 9, 1982—Plaintiff's complaint filed in the United States District Court for the District of Nebraska.

August 12, 1982—Defendant's answer filed.

October 15, 1982—Memorandum and order of the District Court entered.

December 7, 1982—Judgment of the District Court entered, permanently enjoining defendant's from refusing to issue plaintiff a valid non-photographic Nebraska driver's license and awarding plaintiff costs and attorney's fees.

January 6, 1983—Defendant's motion for stay pending appeal.

January 6, 1983—Defendant's notice of appeal.

January 18, 1983—Order of the District Court denying motion for stay pending appeal.

March 1, 1984—Opinion and judgment of the Court of Appeals for the Eighth Circuit entered.

Neb. Rev. Stat. § 60-406.04 (Supp. 1982)

APPENDIX TO PRINTED PETITION FOR CERTIORARI, A33

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-346

FRANCES J. QUARING,

Plaintiff,

vs.

HARRY "PETE" PETERSON*, Director and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Defendants.

PLAINTIFF'S COMPLAINT

Filed July 9, 1982

PARTIES

1. Plaintiff Frances J. Quaring is a citizen of the State of Nebraska, residing in Buffalo County.

2. Defendants Harry "Pete" Peterson and William Edwards are citizens of the State of Nebraska, residing in Lincoln, Lancaster County, Nebraska.

THE NATURE OF THIS ACTION

3. This is a Civil Rights Action arising under 42 U.S.C. § 1983. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that Defendants have violated Plaintiff's civil rights in their application of Neb. Rev. Stat. § 60-406.04 (Supp. 1981) to Plaintiff to deny her a Nebraska Motor Vehicle Operator's License, said denial being an infringement upon Plaintiff's

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*(Holly Jensen substituted as petitioner pursuant to Rule 40.3)

right to freely exercise her religious beliefs, in violation of the First Amendment to the Constitution of the United States and 42 U.S.C. § 1983.

4. Plaintiff also seeks injunctive relief enjoining Defendants from enforcing NEB. REV. STAT. § 60-406.04 (Supp. 1981) as to Plaintiff insofar as that statute requires a Nebraska Motor Vehicle Operator's License to bear a color photograph of the licensee.

JURISDICTION

5. This action arises under 42 U.S.C. § 1983 and jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3).

FACTS

6. Defendant Harry "Pete" Peterson is the director of the State of Nebraska Department of Motor Vehicles and pursuant to *Neb. Rev. Stat.* §§ 60-1501 et seq. (Reissue 1978) is charged with the administration and enforcement of the laws of the State of Nebraska relating to motor vehicles. In addition, Defendant Harry "Pete" Peterson is charged with the administration and enforcement of those laws of the State of Nebraska specifically related to motor vehicle operator's licenses which are found at *Neb. Rev. Stat.* §§60-401 et seq. (Reissue 1978, Cum. Supp. 1980, Supp. 1981).

7. Defendant William Edwards is the deputy director of the State of Nebraska Department of Motor Vehicles and among the duties delegated to him by the Director is responsibility for motor vehicle operators' licensing matters.

8. In doing the acts and things hereinafter set forth, both Defendants were acting in their respective capacities as stated above, under color of the Nebraska statutes cited above, and, in particular, under color of and pursuant to *Neb. Rev. Stat.* § 60-406.04 (Supp. 1981) which reads in pertinent part as follows:

> 60-406.04. Operators' licenses; color photograph affixed; procedure; costs; temporary motor vehicle operator's permit; when issues; fees; period valid. (1) All motor vehicle operator's licenses except limited, special, learners', temporary as provided by subsection (2) of this section and subsection (4) of section 60-415, or school permits issued in the state after January 1, 1978, shall have a color photograph of the licensee affixed thereto.

9. Plaintiff Frances J. Quaring is an adult white female who on April 13, 1982, qualified to be issued a Nebraska Motor Vehicle Operator's License by passing both the law test and the driving test administered by the licensing examiner in Kearney, Buffalo County, Nebraska, said examiner being duly authorized to conduct licensing examinations by the Department of Motor Vehicles, and its Director. A copy of Plaintiff's approved application for a motor vehicle operator's license is attached hereto as Exhibit A, and made a part hereof by this reference.

10. Despite the fact that Plaintiff has qualified to be issued a motor vehicle operator's license, Plaintiff has been prevented from obtaining such a license because she refuses to allow her photograph to be taken as required by *Neb. Rev. Stat.* § 60-406.04 (Supp. 1981).

11. The basis of Plaintiff's refusal to allow herself to be photographed is her sincerely-held religious belief in a

literal interpretation of the Second Commandment which is found in the Bible at Exodus 20:4 and reads as follows:

> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

12. Plaintiff has informally and orally requested of the Defendants that they make an exception to the license photograph requirement in order to accommodate Plaintiff's sincerely-held religious beliefs and Defendants, acting under color of and pursuant to *Neb. Rev. Stat.* § 60-406.04 (Supp. 1981) have refused to make such a religious exception or exemption.

13. Plaintiff has formally made a written request of the Defendants that they make an exception to the license photograph requirement in order to accommodate Plaintiff's sincerely-held religious beliefs and Defendant Harry "Pete" Peterson, Director of the State of Nebraska Department of Motor Vehicles, acting under color of and pursuant to *Neb. Rev. Stat.* § 60-406.04 (Supp. 1981) has issued a formal Order denying Plaintiff's application for a Nebraska Motor Vehicle Operator's License without a color photograph attached to it. A copy of Defendant Peterson's Order is attached hereto as Exhibit B, and made a part hereof by this reference.

14. Plaintiff has been subjected, because of the Defendants' refusal to issue her a motor vehicle operator's license without a color photograph attached, said refusal being under color of the above-cited Nebraska statute, to the deprivation by Defendants of her right to freely exercise her religion as guaranteed to her under the First Amendment to the United States Constitution.

15. As the direct consequence and result of the acts of the Defendants hereinabove complained of, Plaintiff has been deprived of her right to exercise her religion free from interference imposed under color of law; Plaintiff has been denied a Nebraska Motor Vehicle Operator's License even though she was qualified to receive such license; Plaintiff has been denied the privilege freely granted to others who do not hold Plaintiff's religious beliefs to legally drive motor vehicles to her place of employment and for purposes connected with the operation of the family farm she and her husband operate in Buffalo County, Nebraska; and Plaintiff has been denied the privilege freely granted to others who do not hold her religious beliefs to legally drive motor vehicles to religious meetings and interdenominational church functions.

14. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for an Order of this Court declaring that Defendants have violated Plaintiff's First Amendment right to freely exercise her religion by their application of *Neb. Rev. Stat.* § 60-406.04 (Supp. 1981) to Plaintiff; for injunctive relief requiring Defendants to issue a motor vehicle operator's license without a color photograph to Plaintiff; for reasonable attorney fees and the costs of this action; and for such other and further relief as the Court may deem just and equitable.

Plaintiff further requests trial in Lincoln, Nebraska.

(Signature, verification, and jurat
omitted in printing)

EXHIBIT A

DMV 06-01
Revised 7-1-80

NEBRASKA APPLICATION

MUST BE PRESENTED TO THE COUNTY TREASURER

~~OPR~~ ☐ ~~SCREEN~~ ~~TYPE~~

PRINT

Name Frances (First) (J) (Middle Initial) Quaring (Last)

Street, Route or Box No. Rt 2 Box 122 City Shelton

Date of Birth Month Day Year	Age	Color Eyes	Color Hair	Height	Weight	Sex	Race	How long have you driven?
4-1-46	36	Brn	Brn	5'6"	125	F	W	20yrs

Have you or do you now suffer any physical defects that would detract from normal ability to safely operate a motor vehicle?
No

Have you suffered the loss of a No
Foot? ☐ Leg? ☐ Hand? ☐ Arm? ☐

Do you need corrective lenses for driving?
Yes ☐ No ☒

Do you or have you suffered from epilepsy, paralysis, fainting spells, convulsive seizures? No
Circle which. Give date of last attack

Do you possess sufficient eyesight and hearing to enable you to operate a motor vehicle on the streets, alleys or public highways of this state with a reasonable degree of safety?
Yes

Has your operator's license or privilege to operate ever been suspended or revoked? If so, give date, place and period of suspension or revocation.
No

Do you hold a driver's license from another state? Yes ☐ No ☒

If yes, what State?

The undersigned being duly sworn depose or affirmed and say that the answers to the foregoing questions are true.

~~WHITE~~ Your Name Frances (First) (J) (Middle Initial) Quaring (Last)

Signature of Parent or Guardian

Subscribed and sworn or affirmed to before me this day of APR 19

at Kearney, Nebraska

License Examiner Badge No.

Visual Acuity	Both Eyes	Left Eye	Right Eye
With Glasses	20/	20/	20/
~~Without Glasses~~	20/	20/	20/

PERIPHERAL VISION: RT LT

Law Test Given By No. ~~Accepted~~ Rejected

Drive Test Given By No. Accepted Rejected

Have you held a Nebraska license before?
Name:
Expiration Date
State
License No. A9-34913
LP-Sp DOB
BC State No.
REST. CODES: TYPE N

REMARKS, RECOMMENDATIONS, AND RESTRICTIONS

EXAMINER'S CERTIFICATE

TO THE COUNTY TREASURER:

This is to certify that the above applicant may be issued a MOTOR VEHICLE OPERATOR'S LICENSE OR PERMIT, subject to the limitations stated in the application, upon payment of a fee.

Remarks

License Examiner Badge No.

Issued License No. or Permit No. Date of Issuance

ALL VEHICLES
MOTORCYCLES ONLY

30-30-30 W/A 72-73

APPLICATION FOR RENEWAL - EXAMINER'S USE ONLY

Class A

MAR 23 1978

EXHIBIT B
(Attached to Plaintiff's Complaint)

BEFORE THE DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA

In the Matter of the Application for a Nebraska Motor Vehicle Operator's License by FRANCES J. QUARING

ORDER

This matter came on for decision upon the application of Frances J. Quaring for a Nebraska motor vehicle operator's license. Said Order is based upon the files and records of the Department concerning the application and qualifications of said Applicant, and based upon the Affidavit executed by said Applicant and submitted to the Department.

The following findings and fact and conclusions of law are made:

1. That the Applicant has met the necessary requirements to obtain a Nebraska Motor Vehicle Operator's License by passing both the law test and the driving test administered by the licensing examiner in Kearney, Buffalo County, Nebraska.

2. That Neb. Rev. Stat. § 60-406.04 (1981 Supp.), provides in part:

> (1) All motor vehicle operators' licenses except limited, special, learners', temporary as provided by subsection (2) of this section and subsection (4) of section 60-415, or school permits issued in the state after January 1, 1978, shall have a color photograph of the licensee affixed thereto.

3. That Applicant, Frances J. Quaring, has refused to permit herself to be photographed in accordance with the aforesaid statute.

4. That the Director of the Department of Motor Vehicles is without the statutory authority to either amend or interpret Neb. Rev. Stat. § 60-406.04 (1981 Supp.), to provide an exception to the mandatory requirement of a color photograph being affixed to each operator's license issued by the Department.

5. That the Applicant alleges that her refusal to allow herself to be photographed is based upon her religious beliefs.

IT IS THEREFORE ORDERED that the application of Frances J. Quaring for a Nebraska Motor Vehicle Operator's license is hereby denied for the reason that the Director of the Department of Motor Vehicles of the State of Nebraska is without the statutory or constitutional authority to grant an exemption from the mandatory requirement contained in Neb. Rev. Stat. § 60-406.04 (1981 Supp.).

Dated and filed this 3rd day of June, 1982.

BY THE DIRECTOR:

/s/ Harry "Pete" Peterson, Director
Department of Motor Vehicles
State of Nebraska

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DEFENDANTS' ANSWER

Filed August 12, 1982

(Title omitted in printing)

COME NOW the defendants, by and through their attorneys, Paul L. Douglas, Attorney General, and Ruth

Anne E. Galter, Assistant Attorney General, and for answer to the complaint of the plaintiff admit, deny, and allege as follows:

1. The defendants admit the allegations contained in paragraphs 1, 2, 6, 7, 8, 9, 10 and 13 of plaintiff's complaint.

2. Defendants deny the allegations contained in paragraphs 3, 4, 5, 11, 12, 14, 15, and second paragraph 14, and each and every other allegation contained in said complaint not specifically admitted herein.

3. Defendants allege that the Director of the Department of Motor Vehicles is without the statutory or constitutional authority to grant an exemption from the mandatory requirement contained in Neb. Rev. Stat. § 60-406.04 (1981 Supp.).

WHEREFORE, defendants pray this court for an Order dismissing the complaint of the plaintiff herein, affirming the Order of the Director dated June 3, 1982, denying the application for a Nebraska motor vehicle operator's license by the plaintiff herein; taxing the costs of the instant action to the plaintiff herein; and for such other and further relief as the Court may deem just and equitable.

(signature and certificate of service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANCES J. QUARING

vs.

HARRY "PETE" PETERSON, *et al.*

MEMORANDUM AND ORDER
Filed October 15, 1982

APPENDIX TO PRINTED PETITION
FOR CERTIORARI, A1.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANCES J. QUARING

vs.

HARRY "PETE" PETERSON, *et al.*

JUDGMENT

Filed December 7, 1982

Pursuant to the memorandum and order of October 15, 1982, filing 14, and the memorandum of today on application for attorney's fees and costs,

IT IS ORDERED:

1. That the defendants and their agents, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this judgment are permanently enjoined from refusing to issue the plaintiff a valid Nebraska driver's license because of her refusal on religious grounds to have a photograph taken of her and placed on her license; and

2. That the plaintiff is awarded $3,434.00 as attorney's fees and $96.07 as court costs and expenses, to be taxed as costs against the defendants.

Dated December 7, 1982.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DEFENDANTS' MOTION FOR STAY
PENDING APPEAL

Filed January 6, 1983

(Title omitted in printing)

Pursuant to Federal Rule of Civil Procedure 62, the defendants move this court to stay the enforcement of the judgment in this action pending the disposition of the defendants' appeal to the United States Court of Appeals for the Eighth Circuit, and for that purpose to fix the amount of the bond, if any, required to be filed by the defendants.

(Signature and certificate of service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DEFENDANTS' NOTICE OF APPEAL

Filed January 6, 1983

(Title omitted in printing)

Notice is hereby given that Harry "Pete" Peterson, et al., defendants above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment and award of attorney fees entered herein on December 7, 1982, and the Memorandum and Order in support thereof entered October 15, 1982.

(Signature and certificate of service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANCES J. QUARING

vs.

HARRY "PETE" PETERSON, *et al.*

ORDER DENYING MOTION FOR STAY
PENDING APPEAL

Filed January 18, 1983

On consideration of the defendants' motion and the briefs of the parties,

IT IS ORDERED that the motion for stay pending appeal, filing 19, is denied.

Dated January 18, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1105

FRANCES J. QUARING,

Appellee,

vs.

HARRY "PETE" PETERSON*, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles,
State of Nebraska,

Appellants.

*(Holly Jensen substituted as petitioner pursuant to Rule 40.3)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
(Opinion)

APPENDIX TO PRINTED PETITION FOR CERTIORARI, A16.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANCIS J. QUARING

vs.

HARRY "PETE" PETERSON, *et al.*,

JUDGMENT

Filed March 1, 1984

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

March 1, 1984

(Attestation omitted in printing)

No. 83-1944 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOLLY JENSEN, ETC., ET AL., PETITIONERS

v.

FRANCES J. QUARING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

20pp

QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals applied the correct legal analysis under the Free Exercise Clause in determining that respondent's sincerely held religious objection to being photographed outweighs the State of Nebraska's interest in using photographic driver's licenses as a quick and accurate means by which to identify motorists.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1944

HOLLY JENSEN, ETC., ET AL., PETITIONERS

v.

FRANCES J. QUARING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The court of appeals has held unconstitutional, as applied to respondent, Nebraska's statutory requirement for a photographic driver's license. The court concluded that respondent holds a sincere religious objection to being photographed and that the State's "important" interest in quick and accurate identification of motorists is not "so compelling as to prohibit selective exemptions to the photograph requirement" (Pet. App. 19, 27).

The United States does not issue general driver's licenses, and thus we have no programmatic interest

in the resolution of this particular case. The United States does, however, have a substantial interest in the legal approach used to analyze claims that facially neutral statutory requirements violate the Free Exercise Clause. See, *e.g.*, *United States* v. *Lee*, 455 U.S. 252 (1982). Indeed, on November 13, 1984, the United States docketed an appeal to this Court in *Heckler* v. *Roy*, No. 84-780. The question presented in that case is whether 7 U.S.C. 2025(e) and 42 U.S.C. 602(a)(25), which require all applicants for and recipients of benefits under the Food Stamp and Aid to Families with Dependent Children programs to provide state welfare agencies with their social security numbers, violate the Free Exercise Clause as applied to persons who hold a sincere religious objection to the use of such numbers.

As explained in our jurisdictional statement in *Roy* (at 13-18), we believe that the district court in that case, like the court of appeals here, erred in focusing primary attention on the number of persons who potentially might seek a religious exemption from the statutory requirements at issue.[1] In our submission, proper analysis requires a broader examination into the programmatic goals sought to be achieved by the legislature than is possible when a court considers only the Free Exercise claim to an exemption advanced by one individual. Because the Court's mode of analysis in this case could affect the interests of the United States at issue in *Roy*, we briefly set forth our view of the proper legal analysis to be employed in cases of this sort.

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[1] We are providing counsel for the parties in this case with copies of our jurisdictional statement in *Roy*.

SUMMARY OF ARGUMENT

Although we take no position on the correct disposition of this case, we submit that the court of appeals' ruling that the State of Nebraska's requirement for a photographic driver's license is unconstitutional as applied to respondent rests on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. The logical corollary to that premise is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact of judicially-mandated exemptions would be too great. Such a result defies common sense.

In our submission, the "least restrictive alternative" inquiry in Free Exercise cases (which becomes relevant only after it is first determined that the plaintiff has a sincerely held religious objection to the requirement at issue and that the requirement serves a compelling governmental interest) should focus on the programmatic interests furthered by the statutory requirement—in this case, highway safety. If the State can accomplish its objective equally well by adopting a less restrictive alternative applicable to the populace as a whole, then it may be appropriate to require the State to adopt that alternative in the case of a particular plaintiff. But if photographic driver's licenses are required to accomplish the State's general goal of promoting highway safety, then the State should not be required to devise alternatives (or, as the court of appeals held in this case, forgo its interests altogether) simply because the granting of a handful of exemptions might work only a marginal interference with the legislative purposes.

The correctness of this approach is demonstrated by the decision in *United States* v. *Lee*, 455 U.S. 252 (1982), in which this Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his employees. The Court did so despite the fact that an exemption limited to Amish employers would have done little if any damage to the integrity of the social security system, because the Amish not only oppose paying into the system but also oppose receiving benefits. Instead, the Court focused on the compelling governmental interest in uniform administration of the social security program and concluded that mandatory participation by all employers was essential to the achievement of Congress's purposes. So too, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In both cases, the Court declined to grant individualized exemptions from the statutes at issue, even though there was no indication that a few such exemptions would have worked any serious interference with the overall legislative purposes.

This case is distinguishable from *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the Court held that states could not refuse to provide unemployment benefits to persons who had terminated their employment on religious grounds. The statutes at issue in those cases expressly required case-by-case substantive determinations of each individual's entitlement to unemployment compensation, whereas the Nebraska statute at issue here imposes a purely procedural requirement applicable to all who seek general driver's li-

censes. Moreover, requiring states to pay unemployment benefits to workers who had terminated their employment on religious grounds did not interfere with the legislative purpose of ensuring that benefits were paid only to persons who had left their jobs for legitimate reasons. In this case, by contrast, the court below failed to inquire whether Nebraska's overall goal of promoting highway safety could be met if the State must accord certain people the privilege of driving on its roads while at the same time allowing those people to opt out of what may be the most effective program for policing motorists.

ARGUMENT

THE VALIDITY OF AN INDIVIDUAL'S CLAIM TO A RELIGIOUS EXEMPTION FROM A FACIALLY NEUTRAL PROCEDURAL REQUIREMENT DEPENDS UPON AN ASSESSMENT OF THE PROGRAMMATIC INTERESTS SOUGHT TO BE ACHIEVED BY THE LEGISLATURE AND NOT UPON THE COST TO THE STATE OF GRANTING AN EXEMPTION TO ONE OR A HANDFUL OF INDIVIDUALS

The court of appeals has held that the Free Exercise Clause prohibits the State of Nebraska from insisting that respondent comply with its statutory requirement for a photographic driver's license (Neb. Rev. Stat. § 60-406.04 (1978)). The court recognized that the photograph requirement serves "important" governmental interests but concluded that those interests are not "compelling" (Pet. App. 19, 27).[3] Although we take no position on the correct

[3] At the outset, we confess to some uncertainty with respect to the court of appeals' ruling that the photograph requirement does not serve a compelling state interest. The district court found to the contrary (Pet. App. 12), and the court of

disposition of this case, we submit that the court of appeals' ruling was based on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. No decision of this Court supports such a peculiar result. On the contrary, several of this Court's decisions indicate that, when no less restrictive means applicable to the populace as a whole are available to achieve a compelling governmental interest, the individual's interest in religious liberty must yield to the greater interest of society in the public safety and welfare.

A. This Court has repeatedly emphasized that although "the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, * * * '[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limi-

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appeals nowhere repudiated that finding. It appears, however, that the court of appeals employed a different frame of reference for analyzing the state's interest than did the district court. Thus, instead of determining whether the photograph requirement itself serves a compelling state interest, the court of appeals inquired whether Nebraska's refusal to grant respondent an exemption served a compelling state interest (*id.* at 26). As explained in text, we believe that the court of appeals' focus on the effect of granting an exemption, rather than the programmatic interests furthered by the photograph requirement itself, reflects an erroneous approach to the issue before this Court. Before addressing that issue, however, we note that if the court of appeals meant to hold that the State's general interest in the photograph requirement is not compelling, then its analysis should have come to an end. The existence of "less restrictive means" for accomplishing the State's objectives becomes relevant only if it is first determined that the requirement at issue serves a compelling state interest. See page 7, *infra*.

tation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 28 (quoting *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982)).

In both *Bob Jones University* and *Lee*, the Court addressed the question presented here, namely, how to resolve the conflict between a requirement that serves a compelling governmental interest and the contrary dictates of a sincerely held religious belief. When such a conflict occurs, "[t]he remaining inquiry is whether accommodating the * * * belief will unduly interfere with fulfillment of the governmental interest." *Lee*, 455 U.S. at 259. If the belief "cannot be accommodated with that compelling governmental interest, * * * and no 'less restrictive means[']* * * are available to achieve the governmental interest," the government's interest must prevail. *Bob Jones University*, slip op. 29 (citations and footnote omitted). As the Court concluded in *Lee*, 455 U.S. at 259 (footnote omitted):

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, *e.g.*, *Thomas* [v. *Review Board*, 450 U.S. 707 (1981)]; *Sherbert* [v. *Verner*, 374 U.S. 398 (1963)], but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld* [v. *Brown*, 366 U.S. 599, 606 (1961)].

How to determine when that point has been exceeded is a question of concern to the United States because it is the same issue presented in *Heckler* v. *Roy*, No. 84-780. See pages 1-2, *supra*.

B. The court of appeals concluded that respondent's beliefs are religious in nature and that they are sincerely held (Pet. App. 19-23). By the same token, however, the court of appeals did not question the fact that the State has important interests (see note 2, *supra*) in the photograph requirement as a general matter. The critical inquiry in this case is whether the "least restrictive means" analysis is to be applied to the programmatic state interests of identifying motorists, ensuring the security of financial transactions, and avoiding administrative burdens (see Pet. App. 26-29), or whether the Free Exercise Clause requires a case-by-case determination of each individual claim to an exemption. In our view, the court of appeals erred in considering respondent's claim in isolation and in placing its primary focus on the number of persons who potentially might seek an exemption from the photograph requirement.[3] Instead, it should have focused on the programmatic considerations addressed by the Nebraska legislature in enacting the photograph requirement and the legislature's judgment that there should be no exceptions to that requirement in the case of general driver's licenses.[4]

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[3] Although we do not believe that the number of persons seeking an exemption is relevant to the correct disposition of this case, we note that respondent's objections are not unique. See *Dennis* v. *Charnes*, 571 F. Supp. 462 (D. Colo. 1983); *Johnson* v. *Motor Vehicle Division*, 197 Colo. 455, 593 P.2d 1363, cert. denied, 444 U.S. 885 (1979); *Bureau of Motor Vehicles* v. *Pentecostal House of Prayer, Inc.*, 269 Ind. 361, 380 N.E.2d 1225 (1978).

[4] As the court of appeals noted (Pet. App. 27), certain classes of licenses are exempt from the photograph requirement. However, the legislature's decision to permit such categorical exemptions does not necessarily undermine its

This Court's decision in *Lee* demonstrates the error of the court of appeals' analysis. There, the Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his Amish employees. The Court did not confine its analysis to the effect on the social security program of exempting only the Amish; if it had, the programmatic effect would have been beneficial, because the Amish not only oppose paying into the social security system but also oppose receiving benefits, and benefit pay-outs far exceed contributions. See *Lee*, 455 U.S. at 262 (Stevens, J., concurring). Rather, the Court looked to the government's compelling interest in uniform administration of the social security program and tax collection in general and concluded that mandatory participation by all employers was essential to the fiscal vitality of the program. *Id.* at 258-260.

Like *Lee*, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), also demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In *Braunfeld*, the appellants were Orthodox Jewish merchants whose religious convictions required that their places of business remain closed on Saturdays. They sought an injunction to prevent enforcement against them of a state Sunday-closing law, on the ground that closing their businesses on Sundays interfered with their ability to earn a living. The Court rejected the claim, noting that "to permit the exemp-

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determination that the State's compelling interest would be frustrated by recognizing exemptions from the photograph requirement in the case of general driver's licenses. See pages 14-15 & note 8, *infra*.

tion might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity" (366 U.S. at 608).

Prince likewise involved a state statute that imposed an absolute ban on the activity in which the appellants there sought to engage. The statute at issue was a child labor law forbidding children from engaging in street sales of magazines, newspapers, and other merchandise. Unlike the Jewish merchants in *Braunfeld*, whose religious faith was only indirectly burdened by the statute in question (see 366 U.S. at 605-607), the appellants in *Prince* were Jehovah's Witnesses whose religious faith specifically *required* that they engage in the activity the state sought to prohibit—street sales of their religious tracts. Nevertheless, the Court held that the statute was constitutional as applied to the appellants, even though there was no danger to the particular child in question, who had been closely supervised by her aunt.

These cases clearly indicate that when the legislature seeks to advance a compelling governmental interest through uniform application of a facially neutral requirement, it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest.[5] Here, for example, it is quite beside the point whether dispensing with the photograph requirement

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[5] The Court recently made the same point in considering content-neutral regulation of speech. See *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 16 n.12 ("[I]n determining whether a time, place, and manner regulation substantially serves the State's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation.").

might lead any one individual to evade the Nebraska law that permits only licensed motorists to drive on the State's roads. The pertinent inquiry is whether the integrity of the program as a whole can be sustained equally as well without the photograph requirement—that is, whether the requirement found to offend a sincerely held religious belief is essential to accomplishment of the compelling governmental interest, or whether the State could accomplish the same goal by application of a less restrictive alternative to the entire populace (and not merely to the individual plaintiff).[6] The court of appeals erred in failing to undertake such an inquiry.

The correctness of this submission may be demonstrated by the absurd consequences that flow from the court of appeals' analysis. Essentially, the court has held that government must accommodate those individuals holding the most unique and idiosyncratic religious beliefs because the cost of exempting those

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[6] The district court noted in this regard that "[e]xperience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the integrity of identification of drivers was in some doubt" (Pet. App. 12).

There is also something wrong with the notion, implicitly endorsed by the court of appeals, that an individual can insist on receiving the benefits of the governmental privilege of a driver's license while at the same time refusing to comply with that portion of the program that would appear to be the most effective means for ensuring that only licensed and competent motorists drive on the State's highways. The court of appeals failed to identify any less restrictive alternatives that would satisfy the State's interest in highway safety, apparently believing it sufficient that a few drivers without photographs would not be likely to cause substantial safety hazards. This approach is a distortion of the "least restrictive alternative" inquiry that finds no support in this Court's decisions.

few individuals from a facially neutral procedural requirement would be quite small. The logical corollary to this holding is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great. In essence, the right to the free exercise of religious beliefs would shrink as the number of persons who share those beliefs grows. Such a result defies common sense.

In addition, there would appear to be no limit to the "accommodations" that could be required of government under the court of appeals' approach. Respondent objects to being photographed but apparently does not object to providing any of the other identifying information required by the State. But another plaintiff might object to the use of numbers (cf. *Heckler* v. *Roy*, *supra*) and insist that the State issue him an unnumbered driver's license even though such a license would seriously interfere with the computerization necessary to manage a large-scale government program. Viewing each case in isolation, as the court of appeals' decision requires, the State would be obliged to accommodate these sorts of demands, because it unquestionably could do so in a handful of instances without undue burden or expense and with only the most minimal damage to its interest in highway safety. Logic compels the conclusion, however, that there are limits to the accommodations government is required to make in administering facially neutral program requirements, and those limits are all too likely to be exceeded when the judiciary engages in the sort of case-by-case analysis employed by the court below.

C. The present case can be distinguished from other cases in which this Court has required states to

permit religious exemptions from otherwise applicable statutory requirements. See *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Both *Thomas* and *Sherbert* involved applicants for unemployment compensation who, as a result of having been denied benefits, were forced to choose between receiving no income or continuing to engage in employment-related activity that violated their religious beliefs. In both cases, this Court held that the states were required to accommodate the religious beliefs of the individuals involved.

In contrast to the present case, however, the statutes under consideration in *Thomas* and *Sherbert* explicitly permitted exemptions from their general requirements based on *individualized* determinations of "good cause."[7] In both *Thomas* and *Sherbert*, state agencies had to make case-by-case substantive determinations concerning an individual's entitlement to unemployment compensation. Because the statutes at issue clearly contemplated the granting of individualized exemptions, requiring the states to consider religious claims did not significantly interfere with the states' ability to achieve their compelling interest in ensuring that unemployment benefits were paid only to those persons who had terminated their employment for legitimate reasons. Thus, the statutes in *Thomas* and *Sherbert* provided by their own terms

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[7] Thus, the provisions of the South Carolina Unemployment Compensation Act at issue in *Sherbert* provided that employees were ineligible for benefits only if they " '[have] failed, *without good cause*' " to apply for, accept, or return to work. 374 U.S. at 400 n.3 (emphasis added; citation omitted). Similarly, in *Thomas*, the statute provided that an individual was ineligible for benefits if he "voluntarily left his employment *without good cause*." 450 U.S. at 710 n.1 (emphasis added).

the necessary "play in the joints," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970), to allow for exemptions grounded in the Free Exercise Clause.

Here, however, the Nebraska statute at issue imposes a purely procedural requirement applicable to all who seek general driver's licenses. Those who issue the licenses do not make individualized determinations concerning the granting of exemptions; instead, that decision has been made by the legislature in defining *categories* of special licenses for which a photograph is not required.[8] That the legislature might have written the statute differently, to permit individually-determined exemptions, is irrelevant. See *Lee*, 455 U.S. at 260-261; *Braunfeld*, 366 U.S. at 608.[9] The court of appeals should have accorded

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[8] The court of appeals thought it extremely significant that the legislature has enacted categorical exemptions from the photograph requirement and concluded from that fact that individualized exemptions would not interfere with the statutory scheme (Pet. App. 27). The court's conclusion does not necessarily follow from the mere existence of categorical exemptions. The court should have considered the types of exemptions that the legislature has chosen to permit and determined whether those categories are sufficiently different from general licenses that additional, individualized exemptions would be inconsistent with the legislature's general purposes.

[9] In *Lee*, the Court noted that Congress had permitted an exception from the social security tax for self-employed Amish. 26 U.S.C. 1402(g). The Court declined to extend a similar exemption to Amish employers on constitutional grounds, reasoning that "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260.

Similarly, the Orthodox Jewish merchants in *Braunfeld* objected to the fact that the Sunday-closing law there at issue

greater deference to the lines drawn by the Nebraska legislature. See *Lee*, 455 U.S. at 260.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reviewed in light of the State's programmatic interests in imposing a photograph requirement on all those who seek general driver's licenses, without regard to the burden or expense that might be incurred by the granting of an exemption in this particular case.

Respectfully submitted.

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NOVEMBER 1984

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did not permit exemptions for religious reasons. The Court noted that "[a] number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation." 366 U.S. at 608 (footnote omitted).

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No. 83-1944

In The

Supreme Court of the United States

October Term, 1984

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director,
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCES J. QUARING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Does Nebraska's statutory requirement of a photograph on a driver's license constitute a burden upon the respondent's free exercise of her religion?

2. Is there a less restrictive alternative which will serve the state's compelling interest in the photograph requirement?

3. Does the creation of an exemption to the photograph requirement, based solely on religious grounds, contravene the Establishment Clause of the First Amendment?

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BRIEF OF PETITIONERS

CITATIONS TO THE OPINIONS BELOW

The opinion of the District Court for the District of Nebraska, No. CV82-L-346, slip opinion (D.Neb. October 15, 1982), appears at Pet. Cert. A1. The opinion of the Court of Appeals, 728 F.2d 1121 (8th Cir. 1984), appears at Pet.Cert. A16.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 1, 1984. A petition for certiorari was filed within ninety (90) days of that date on May 26, 1984. Certiorari was granted October 1, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Constitution of the United States

   > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

2. Neb.Rev.Stat. § 60-406.04 (1982 Supp.), Pet.Cert. A33.

———o———

STATEMENT OF THE CASE

The respondent, Frances J. Quaring, sought a Nebraska driver's license, but refused to have her photograph affixed thereto as required by Nebraska law. Neb.Rev. Stat. § 60-406.04 (1982 Supp.) Pet. Cert. A33. She based her refusal on her literal interpretation of the Second Commandment which provides: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth." Exodus 20:4, Deuteronomy 5:8.

Mrs. Quaring believes that the Second Commandment is violated by the taking of a photograph. She possesses no photographs of her family, does not own a television set, and refuses to allow decorations in her home depicting floral designs, animals or other creations in nature.

After the denial of her application for a nonphotographic license, she brought an action in the United States District Court for the District of Nebraska claiming a violation of her civil rights. She alleged that the denial of her request infringed upon the free exercise of her religion in contravention of the First Amendment of the United States Constitution under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

The district court found that the state had shown two compelling interests in public safety on streets and highways and security of financial transactions relative to the requirement of a photographic driver's license. However, it concluded that the creation of an exception, on religious grounds, would not pose an administrative burden of such a magnitude so as to render the entire statutory scheme unworkable. This conclusion was based on its reasoning that the requirement was not the least restrictive alternative available. An injunction was issued prohibiting the petitioners from refusing to grant Mrs. Quaring a nonphotographic driver's license.

The judgment was affirmed by a split decision in the United States Court of Appeals for the Eighth Circuit. It found that the photograph requirement constituted a burden on the free exercise of Quaring's religious belief, and that the state's interest did not outweigh the burden imposed. It further found that the creation of an exemption on religious grounds would not cause any undue adminis-

trative burden, nor would the exemption and accommodation of Quaring's religious belief contravene the Establishment Clause of the First Amendment. Judge Fagg, Circuit Judge, dissented, finding that the state's interest was of sufficient magnitude to justify an indirect burden on respondent's free exercise of religion, and that an accommodation for her would "unduly interfere with fulfillment of a government interest." *Quaring v. Peterson*, 728 F.2d 1121, 1128 (8th Cir. 1984).

SUMMARY OF ARGUMENT

The nature of the interest in obtaining a driver's license is critical. It is the strong position of the state that this case should not have proceeded beyond a determination that the right to drive is not a constitutionally fundamental right. *Dixon v. Love*, 431 U.S. 105 (1977); *Montgomery v. North Carolina Department of Motor Vehicles*, 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979); *Wells v. Malloy*, 402 F.Supp. 856 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2nd Cir. 1976); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973); *Ruge v. Kovach*, 467 N.E.2d 673 (Ind. 1984). In the absence of a fundamental right, the requirement of a photograph must only bear a rational relationship to the statute's objective, which it clearly does. The photograph is directly related to the welfare and safety of the public and is well within the state's police power. The state's ability to regulate the use of it's highways is broad and pervasive, and licensed drivers are subjected to a myriad of eligibility requirements and summary revocation and suspension procedures. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Mackey v. Mon-*

trym, 443 U.S. 1 (1979); *Bell v. Burson*, 402 U.S. 535 (1971).

Mrs. Quaring refused to comply with the requirement of a photograph because of her religious belief. Consequently, she could not obtain a valid Nebraska driver's license. She has no property interest in, or an entitlement to, a license as a matter of right. The lower court's description of this as a deprivation of a "benefit" under the rationale set forth in *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), is in error. The receipt of social welfare benefits constituting subsistence is clearly distinguishable from the denial of a license because of Quaring's refusal to comply with one of the state's requirements. Absent a fundamental right to drive, Quaring's request for an exception does not present a free exercise claim.

Also lacking, as conceded by the court below, is any element of coercion which forces Quaring to choose between adherence to her faith and receipt of a benefit to which she is entitled. Her self-imposed decision to adhere strictly to her belief may cause inconvenience and added expense, but those reasons are insufficient to give rise to a free exercise claim. *Braunfeld v. Brown*, 366 U.S. 599 (1961). The absence of a fundamental right to drive, together with the lack of coercion to force Quaring to act in violation of her faith, compels the conclusion that there is no burden upon the free exercise of her religion. Absent proof of such a burden, it was unnecessary to engage in an examination of the state's compelling interest in photographic licenses or whether there existed a less restrictive alternative.

The requirement of a photograph on a driver's license serves the state's compelling interest in the ready and instantaneous identification of its licensed drivers. It is a unique means of identification, and no other alternative can achieve the same result. It is directly related to public welfare and safety, providing law enforcement and all those who rely upon it with positive identification. All states will now require a photograph as of January 1, 1985.

Assuming for purposes of argument that Quaring has asserted a free exercise claim, the state's compelling interest is sufficient to outweigh any incidental infringement on the free exercise of her religion. The court below characterized her belief as unusual in the twentieth century. The impropriety of state officials determining the religiosity of claims such as Quaring's is compounded by the vast numbers of officials who would be required to make that very determination. The potential for error and personal bias is great. Since the questioning of truth or sincerity is prohibited, the practical effect of the lower court's decision is to create an exemption on demand.

Finally, the creation of an exemption solely on religious grounds constitutes a violation of the Establishment Clause. The very purpose of the Clause is to prevent government officials from evaluating the relative merits of various religious claims. *United States v. Lee*, 455 U.S. 252 (1982).

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ARGUMENT

I.

The requirement of a photograph on a driver's license does not violate the Free Exercise Clause of the First Amendment for the reason that the right to drive is not a constitutionally fundamental right.

Two state supreme courts have treated the issue of a photograph requirement in the face of free exercise claims. In a factually similar case, the Colorado Supreme Court rejected a challenge to the photograph requirement by members of the Assembly of YHWHHOSHUA who also based their belief on a literal translation of the Second Commandment. Upholding the state's compelling interest in photographic identification, it found the requirement was an "indispensable underpinning of the purposes underlying the state's interest in issuing driver's licenses." *Johnson v. Motor Vehicle Division,* 197 Colo. 455, 459; 593 P.2d 1363, 1365 (1979). The *Johnson* case was presented to this Court but certiorari was denied. 444 U.S. 885 (1979). A contrary result was reached in *Bureau of Motor Vehicles v. Pentacostal House,* 269 Ind 361, 380 N.E.2d 1225 (1978). The Indiana Supreme Court found a photograph requirement to be unconstitutional as applied to members of the Pentacostal House of Prayer who also believe in a literal reading of the Second Commandment. Unlike *Johnson,* however, that case was not presented to this Court for review.

The threshold inquiry in any First Amendment analysis is whether or not a burden exists at all on the free exercise of religion. The Eighth Circuit concluded that "in refusing to issue Quaring a driver's license, the state with-

holds from her an important benefit." *Quaring v. Peterson,* 728 F.2d 1121, 1125 (8th Cir. 1984). Pet.Cert. A24. The court below relied heavily on *Thomas v. Review Board,* 450 U.S. 707 (1981) and *Sherbert v. Verner,* 374 U.S. 398 (1963). In *Thomas* the issue was whether a state's denial of unemployment compensation benefits to a Jehovah's Witness, who voluntarily terminated his job because of his religious belief, constituted a violation of his First Amendment right to the free exercise of religion. Finding such a violation, the Court noted that "here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; . . ." 450 U.S. at 717.

In *Sherbert,* factually similar to *Thomas,* a Seventh Day Adventist was discharged for her refusal to work on Saturday, her day of worship, and was denied unemployment compensation benefits. This was also considered an infringement. "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodist, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' " *Sherbert v. Verner,* 374 U.S. at 410.

The critical and preliminary inquiry must be to define the nature of the interest in obtaining a driver's license. It is not whether the photograph requirement infringes upon the free exercise of Quaring's religion. Rather, the preliminary question posed is whether Quaring is entitled to a driver's license as a matter of right. The court below appears to elevate the privilege of obtaining a driver's

license to that of a fundamentally protected right. "Clearly, a burden upon Quaring's free exercise of her religion exists in this case. The state refuses to issue Quaring a driver's license unless she agrees to allow her photograph to appear on the license, a condition that would violate a fundamental precept of her religion. Moreover, in refusing to issue Quaring a driver's license, the state withholds from her an important benefit. . . . The burden on Quaring is indistinguishable from the burden placed upon a Sabbatarian by the state in *Sherbert v. Verner.*" *Quaring v. Peterson,* 728 F.2d at 1125, Pet.Cert. A24. It is this faulty assumption regarding the right to a driver's license which belies the remainder of the lower court's analysis. If, in fact, Quaring is not entitled to a driver's license as a matter of right, her free exercise claim does not arise.

No burden should be found on the free exercise of Quaring's religion if the state refuses to create an exception to its otherwise valid photograph requirement. Neither the district court nor the Eighth Circuit held the photograph requirement unconstitutional per se, but only *as applied* to Mrs. Quaring. She does not claim that she is entitled as of right to a nonphotographic license. Rather, she only requests that an exception be made for her because of her personally held belief that the taking of her photograph would violate the free exercise of her religion. Plaintiff's Complaint, A3-10.

Society today is founded upon notions of entitlement. Accordingly, certain levels of protection are afforded differing interests. Professionals have an interest in their licenses to practice, workers have interests in their union contracts and pension rights, and merchants gain an inter-

est in their franchises. All relate to security and independence. However, need or desire alone is insufficient to establish these rights.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). *See also, Arnett v. Kennedy,* 416 U.S. 134 (1974).

It is well established that the power of the state to regulate the use of its highways is broad and pervasive. *Bibb v. Navajo Freight Lines,* 359 U.S. 520 (1959). Accordingly, the state may require individuals seeking a driver's license to establish their eligibility for a license in a number of ways. They must demonstrate knowledge of the applicable rules of the road, are required to actually drive a motor vehicle accompanied by an examiner, and must pass a vision test. Additionally, an applicant is required to have his or her photograph affixed to the license pursuant to Neb.Rev.Stat. § 60-406.04 (1982 Supp.) Pet. Cert. A33. It was agreed that Mrs. Quaring met all requirements except that she refused to be photographed. Consequently, she was denied a Nebraska driver's license.

The majority of cases dealing with a person's interest in a driver's license focus on questions of due process. The inquiry is generally couched in terms of the level of

due process afforded an individual who has already been granted a license.

> *Once licenses are issued,* as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

(Emphasis supplied.) *Bell v. Burson,* 402 U.S. 535 (1971). We do not reach the inquiry as to the level of due process afforded Mrs. Quaring. If she cannot prove she is entitled to the license, there can be no question of a burden on the free exercise of her religion by the denial of her request for an exception. "Only if a burden is proven does it become necessary to consider whether the governmental interest served is compelling, or whether the government has adopted the least burdensome method of achieving its goal." *Wilson v. Block,* 708 F.2d 735 (1983), *cert. denied* 104 S.Ct. 371, 104 S.Ct. 739.

The cases involving questions of due process are instructive in that they examine the ***nature*** of the interest involved as it relates to the level of due process that is necessitated. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg v. Kelley,* 397 U.S. 254, 263 (1970); ***Dixon***

v. Love, 431 U.S. 105 (1977); *Bell v. Burson*, 402 U.S. 535 (1971).

The Eighth Circuit's reliance on *Thomas* and *Sherbert* and its characterization of the right to drive as a "benefit", so as to give rise to a free exercise claim, is in error. In its assessment of the alleged burden on Quaring's free exercise of religion, the majority states:

> [I]n refusing to issue Quaring a driver's license the state withholds from her an important *benefit*. Quaring needs to drive a car for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home. By requiring Quaring to comply with the photograph requirement, the state places an unmistakable burden upon her exercise of her religious beliefs.

(Emphasis added.) *Quaring v. Peterson*, 728 F.2d at 1125, Pet.Cert. A24. The lower court found the burden on Quaring to be "indistinguishable" from the burden placed upon the Sabbatarian in *Sherbert*. It is this rudimentary error which, of necessity, invalidates the remainder of the lower court's analysis and conclusions.

Both *Sherbert* and *Thomas* dealt with the receipt of public welfare benefits. This Court has clearly drawn a distinction between interests involving financial subsistence and that of having a driver's license.

> [A] driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence. . . . We therefore conclude that the nature of the interest here is not so great as to require us "to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

Dixon v. Love, 431 U.S. at 113. Admittedly, this distinction relates to a due process question, but the same analogy may be drawn as to the nature of the interest at issue here. If a driver's license does not rise to the same level as do welfare benefits for purposes of due process, it follows that the same conclusion should be reached for purposes of defining a property interest or entitlement to a license.

The Second Circuit has specifically held that there is no fundamental right to a driver's license. In a suit challenging the constitutionality of a Vermont statute providing for the suspension of the right to drive of persons who have not paid an automobile purchase and use tax assessment, the court found that the plaintiff needed to be able to "drive to visit the doctor, shop for groceries, and attend to other details of family life. No other member of his household holds a driver's license." *Wells v. Malloy,* 402 F.Supp. 856, 858 (D.Vt. 1975), *aff'd* 538 F.2d 317 (2d Cir. 1976). The court rejected a strict scrutiny test in response to an alleged equal protection argument. "In this instance there is no fundamental right. Although a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858.

The Fourth Circuit has also held that the revocation of a driver's license does not deprive an individual of any fundamental constitutional right. *Montgomery v. North Carolina Department of Motor Vehicles,* 455 F.Supp. 338 (W.D.No.Car. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979). Accordingly, the First Circuit has indicated that, although a plaintiff did not assert a constitutional right to a driver's license, "[W]e may take it as settled that such a

right, federal or state, does not exist." *Raper v. Lucey,* 488 F.2d 748, 751 (1st Cir. 1973).

It is interesting to note that the Indiana Supreme Court in August of this year specifically held that there is no fundamental right to drive. "Neither this Court nor the United States Supreme Court has ever held that there exists a fundamental right to drive a motor vehicle." *Ruge v. Kovach,* 467 N.E.2d 673, 677 (Ind. 1984). The court in *Ruge* also rejected the argument that there exists a fundamental right to drive based upon a right to employment, relying on *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976). Similarly, it found that the fundamental right to interstate travel did not imply "a fundamental right to drive since the voluntarily induced suspension of a person's driver's license does not necessarily curtail that person's freedom to move from state to state," citing *Shapiro v. Thompson,* 394 U.S. 618 (1969). Given the Indiana Supreme Court's clarification of the nature of the interest involved in a driver's license, its previous grant of an exemption to a photograph requirement on religious grounds and its opinion in *Bureau of Motor Vehicles v. Pentecostal House,* 269 Ind. 361, 380 N.E.2d 1225 (1978), has doubtful significance.

Clearly, the state's grant of a driver's license carries with it the concomitant ability of the state, through its police power, to place whatever reasonable restrictions it wishes on its issuance and use.

> Although the privilege might be a valuable one, it is no more than a permit granted by the state, with its enjoyment depending upon compliance with prescribed conditions and always subject to such regulation and control as the state may deem necessary to preserve the safety, health and morals of its citizens.

Ogren v. Miller, 373 F.Supp. 980, 982 (W.D.Ky. 1973). *Perez v. Tynan,* 307 F.Supp. 1235 (D.Conn. 1969). Even if the right to drive were a property right, it would still be subordinate to the state's right to regulate and control its issuance and use. "The Commonwealth, in the exercise of its legislative wisdom, through its police powers, can delineate any reasonable limitations it wishes in bestowing the privilege." *Ogren v. Miller, supra.*

Absent the involvement of a fundamental right, Nebraska's requirement of a photographic driver's license must only bear a rational relationship to the statute's objective. *Wells v. Malloy,* 402 F.Supp. 856, *aff'd* 538 F.2d 317 (2nd Cir. 1976). This was fully met in the lower court's specific finding that quick and accurate identification of motorists and security of financial transactions serve important state interests. The inquiry was complete at that point. The photograph is related directly to the public safety and welfare and the requirement is well within the state's police power. *See, also, Powers v. State Department of Welfare,* 208 Kan. 605, 493 P.2d 590 (1972), holding that a regulation of the State Department of Public Welfare which required a medical examination, contrary to applicant's religious beliefs, as a condition of eligibility for receiving aid to the disabled did not violate applicant's freedom of religion.

> A state acting through the police power may reasonably limit the free exercise of religion for the protection of society. Where the exercise of legislative power comes into conflict with the freedom of religion, the validity of legislation will depend upon the balance of the factors affecting the public interest. The individual cannot be permitted on religious grounds to be the sole judge of his duty to obey laws enacted in the public interests.

208 Kan. at 614, 493 P.2d at 597-598.

This Court has recognized the distinction to be drawn between *Thomas* and *Sherbert* and other cases presented for review. In a case involving the imposition of social security taxes upon members of the Amish sect, Justice Stevens in his concurrence noted the tension between that instance and those situations presented in *Sherbert* and *Thomas*. "Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." *United States v. Lee*, 455 U.S. 252 (1982), n. 3, pp. 263-64. The photograph requirement is but one condition imposed prior to the issuance of a driver's license. It is facially neutral and applies to all applicants. There is no property right which arises *prior* to its issuance. Quaring is not being singled out, because of her religion, for adverse treatment. Therefore, this Court's rationale in *Thomas* and *Sherbert* should be limited to a reaction to disparate treatment because of religious views as opposed to the grant of favored treatment for the members of a particular religious sect. Further, the interest being considered here is not of such a nature as to rise to the level of an entitlement.

Sherbert and *Thomas* can also be viewed in light of the greatly expanding area of social welfare legislation encompassing the fields of Social Security, unemployment compensation, public housing, and other forms of public aid. The Court's interpretation of the accommodation of religious belief has, in some part, recognized that individuals become entitled to certain benefits upon meeting statutory requirements of eligibility. "More than thirty years ago the court held that a person may not be com-

pelled to choose between the exercise of a First Amendment Right and participation in an otherwise available public program." *Thomas v. Review Board,* 450 U.S. at 716. The question of eligibility was also present in *Sherbert v. Verner.*

> Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

374 U.S. at 404. It is the denial of benefits to which these individuals *were otherwise entitled* that gave rise to a First Amendment claim. The nature of the right to drive and its dissimilarity to the interests examined in *Thomas* and *Sherbert* are of significance in the resolution of this case.

> The types of "liberty" and "property" protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.

Arnett v. Kennedy, 416 U.S. 134, 155 (1974). There can be no set of inflexible procedures which will be universally applicable to all situations. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

Quaring alleges that she is qualified to be issued a motor vehicle operator's license, but has been prevented from obtaining it because of her refusal to be photographed as required by statute. She further alleges that she has been denied the privilege freely granted to others who do not hold her religious belief to legally drive motor vehicles. Plaintiff's Complaint, paragraphs 10, 15; A5, A7. Although not specifically alleged, it would appear that Quar-

ing is asserting a property interest or a "right to drive" despite her noncompliance with Neb.Rev.Stat. §60-406.04, Pet. Cert. A33. Property interests are not constitutionally created. They may, however, arise via existing rules or understandings that stem from state law which support claims of entitlement. *Board of Regents v. Roth,* 408 U.S. at 577. The right to drive or to have an operator's license in Nebraska is expressly created by statute. The requirement of a photograph on Quaring's license is but one of several statutory conditions precedent to its issuance. This Court has viewed skeptically the action of a litigant who challenges the constitutionality of a portion of a statute under which it simultaneously claims benefits.

> "It is an elementary rule of constitutional law that one may not retain the benefits of an Act while attacking the constitutionality of one of its important conditions."
>
> . . . .
>
> We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Arnett v. Kennedy, 416 U.S. at 153-154. Therefore, Quaring's refusal to comply with the photograph requirement should preclude her claim regarding the statute's constitutionality as well as her claim to that license as a matter of right.

A further reason for finding that there is no burden upon the free exercise of Quaring's religion is that there is no coercive impact on her to choose between adherence to her faith and the receipt of a nonphotographic driver's

license. The element of coercion of action which is contrary to religious belief is basic to a free exercise claim. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Review Board,* 450 U.S. 707; "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief. (citations omitted) . . . This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices." *Sequoyah v. Tennessee Valley Authority,* 480 F.Supp. 608 (E.D. Tenn. 1979); *aff'd* 620 F.2d 1159 (6th Cir. 1980), *cert. denied* 449 U.S. 953 (1980).

The instant situation is markedly different from those involving coercion of action. Quaring's belief is based on her personal and literal interpretation of the Second Commandment which, according to her, precludes the taking of her photograph. The opinion below states that ". . . Nebraska officials correctly point out that the photograph requirement in no way compels Quaring to act in violation of her conscience. . ." *Quaring v. Peterson,* 728 F.2d at 1125, Pet.Cert. A23. However, it then concludes that a burden exists because of the substantial pressure on Quaring to violate her belief. The choice presented to Quaring is whether to forego the privilege of obtaining a driver's license or allow herself to be photographed. The state is not forcing her to act in violation of her belief. Her self-imposed decision to adhere strictly to her faith may prove to be inconvenient and more ex-

pensive, but those reasons are wholly insufficient to give rise to a free exercise claim. *Braunfeld v. Brown*, 366 U.S. 599 (1961).[1] There is no indication that Quaring would be unable to secure alternate means of transportation or to attend church services or to practice her belief. As Judge Fagg correctly pointed out in his dissent, Quaring's difficulties are not insurmountable and she is not the only person faced with the need to make lifestyle adjustments which are precipitated by nonconformity with driver's license requirements. *Quaring v. Peterson*, 728 F.2d at 1125. (Pet.Cert. A31).

The absence of a fundamental right to drive, coupled with the lack of coercion to compel Quaring to act in violation of her faith, mandates the conclusion that there is no burden upon the free exercise of her religion. Absent proof of such a burden, it is unnecessary to consider whether the governmental interest is compelling, or whether the government has adopted the least restrictive alternative of achieving the goal of its regulation. *Wilson v. Block*, 708 F.2d 735 (1983), *cert. denied*, 104 S.Ct. 371, 739. Therefore the lower court's decision should be reversed with no further inquiry as to the competing interests of the state and Mrs. Quaring.

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[1] *Braunfeld* found no violation of the Free Exercise Clause by a state statute enforcing a Sunday-closing law even though Orthodox Jews adhered to their faith by closing their shops from nightfall on Friday to nightfall each Saturday.

> "... [T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." 366 U.S. at 605.

II.

Assuming the existence of a burden upon the free exercise of Quaring's religion, the state's compelling interest in a photographic driver's license outweighs any incidental infringement.

Sherbert sets forth three elements which must be weighed in determining whether a governmental interest "overbalances" the right to the free exercise of religion: first, the importance of the secular value of the regulation; second, the degree of proximity and necessity that the regulation bears to the underlying value; and third, the impact of an exemption on the overall regulatory scheme. Assuming arguendo that Quaring's free exercise of religion is burdened, the lower court's decision is in error relative to the state's compelling interest in ready and instantaneous identification of regulated individuals, including licensed drivers. *Johnson v. Motor Vehicle Division,* 197 Colo. 455, 593 P.2d 1363, *cert. denied,* 444 U.S. 885 (1979); *Dennis v. Charnes,* 571 F.Supp. 462 (D. Colo. 1983), *rev'd and remanded for further proceedings,* No. 83-C-1154 (10th Cir. Sept. 24, 1984); *United States v. Lee,* 455 U.S. 252 (1982); *Forbush v. Wallace,* 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970 (1972); *Goldberg v. Kelley,* 397 U.S. 254 (1970).

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." . . .
>
> . . . .
>
> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but

> every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 259-261. In defining a state's interest in ready and instantaneous identification of its licensed drivers, the Colorado Supreme Court stated: "The exigencies of law enforcement cannot brook the delay inherent in other means of identification." *Johnson v. Motor Vehicle Division*, 197 Colo. 455, 459; 593 P.2d 1363, 1365. Accordingly, the lower court found two compelling interests in photographic identification and security of financial transactions.[2] However, it did not agree that these interests were of sufficient magnitude to justify the incidental infringement or the free exercise of religion.

Free exercise claims have been raised against the requirement and/or utilization of social security numbers. These numbers serve an important and compelling state interest in identification—a similar purpose served by photographic driver's licenses. In *Callahan v. Woods*, 559 F.Supp. 163 (N.D. Cal. 1982), the court found, (on remand from the Ninth Circuit after the decision in *Thomas*), that the indirect burden "is heavily outweighed by the government's compelling interest in requiring each

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[2]The importance of the requirement is evidenced by the fact that virtually all states now require photographic licenses, a point also noted by the Eighth Circuit. *Quaring v. Peterson*, 728 F.2d at 1126, Pet. Cert. A26. New York, the most populous state, will begin requiring photographs on licenses as of January 1, 1985. The District of Columbia, the Virgin Islands, Guam and American Samoa have similar requirements.

aid recipient to have a SSN, and the Court further holds that this is the least restrictive means of achieving its all-compelling interest in administrative viability of administering the enormous social security program, . . ." *Id.* at 164.[3] The court in *Callahan* relied on *United States v. Lee*, for the proposition of a compelling interest in the administrative viability of the system. A similar argument was set forth by Judge Fagg in his dissent in the instant case.[4]

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[3]On Appeal, the Ninth Circuit has again remanded this case for a determination of the cost of exempting Callahan from the SSN regulation. *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984).

[4] Nebraska's photographic license requirement advances the state's interest in public safety on the streets and highways by providing police officers in the field with an accurate and instantaneous means of identifying motorists. Significantly, a police officer arriving at the scene of an accident or stopping a vehicle in connection with a traffic violation or suspected criminal activity is assured that the individual displaying the license is in fact the individual to whom the license was issued. As noted in the majority opinion, the fact that 47 of the 50 states require a photographic driver's license indicates the unique advantage derived from this instantaneous identifier.

The majority does not attempt to advance any less restrictive means of accomplishing the state's compelling interest in "quick and accurate identification of motorists." Rather, the majority states that in weighing the competing interests involved, it is necessary to consider whether granting "selective exemptions" to the state's requirement would impair the state's ability to achieve its objective. This approach simply ignores or casts aside the state's legitimate interest in assuring instantaneous identification for all of its regular license holders. I am convinced that accommodation of Quaring's religious practice by issuance of a driver's license lacking a photographic identifier would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee*, 455 U.S. 252, 259 (1982). "The ready certainty inherent in photographic identification would be lost." *Johnson v. Motor Vehicle Division*, 593 P.2d 1363, 1365 (Colo. 1979).

Quaring v. Peterson, 728 F.2d at 1128, Pet.Cert. A30-31.

The court in *Callahan* distinguished *Thomas*, finding it significantly different, "Thomas dealt with a requirement for eligibility for receipts of benefits . . . that constituted the substantive criteria for participation in a government program, but did not affect the fundamental administration of the system as a whole; . . ." The court emphasized the unique identification value of a social security number finding that it is "necessary to enable the system to function." *Callahan v. Wood*, 559 F.Supp. at 169-170. An opposite result was reached in *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y. 1977). However, that decision appears to be based upon insufficiency of evidence presented on behalf of the state. *Mullaney v. Woods*, 158 Cal.Rptr. 902, 97 Cal.App.3d 710 (1979), used the same compelling state interest standard but ruled opposite *Stevens*. "The use of a number to identify each recipient of aid was intended to facilitate the administration of the vast, constantly growing, welfare programs . . . . The chief value of a system lies in its ability to apply uniformly to all within its scope, without exception." 158 Cal.Rptr. at 911-12, 97 Cal. App.3d.

It should be noted that twelve states now use a social security number as the driver license number.[5] Nebraska requires that a social security number appear on its licenses as well as on other forms of identification and that information is accessible through its computer system.[6]

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[5]The following states utilize a social security number as the driver's license number: Georgia, Hawaii, Idaho, Indiana, Iowa, Massachusetts, Mississippi, North Dakota, Oklahoma, Virginia and the District of Columbia.

[6]Neb.Rev.Stat. §68-633 (Reissue 1981):

> After July 6, 1972, each motor vehicle operator's license issued by the state and each identification card or other form of personal identification issued by any agency of the state or any political subdivision of the state shall set forth the holder's social security number.

The government's interest in uniformity and ready accessibility of information is apparent.

While *Callahan*, *Thomas*, and *Sherbert* all deal with the receipt of social welfare benefits, there appears to be a valid argument that administrative convenience is an important consideration. "The regulation requiring SSN for AFDC [Aid to Families with Dependent Children program] recipients appears to be essential for the system's efficient operation, because the use of SSNs as unique identifers is by far the most cost-effective means of administering the program." 736 F.2d at 1274. Additionally, *Callahan* is further distinguishable from Quaring's claim for the reason that the plaintiff in *Callahan* was otherwise qualified for the benefits.

Another instance of the importance of identification is found in *United States v. O'Brien*, 391 U.S. 367 (1968), *rehearing denied* 393 U.S. 900 (1968), a case dealing with criminal convictions for burning draft cards.

> The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

Id. at 377-378. While draft cards are of a more limited use, it is apparent that administrative viability is an important consideration. The central purpose of Nebraska's photograph requirement is identification. The creation of exemptions greatly undermines that legitimate function.

It is evident that the state's interest in instantaneous identification of its licensed drivers and in the security

of financial transactions outweighs any alleged incidental infringement on respondent's free exercise of religion. Uniform administrative regulation is an important consideration. "[T]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown,* 366 U.S. at 606, cited in *Thomas.* The compelling interest of the state is directly related to the safety and welfare of its citizens in general. The ability of a state to limit the free exercise of religion is appropriately given in those instances which involve such matters. *Sherbert v. Verner,* 374 U.S. 398; *Thomas v. Collins,* 323 U.S. 516 (1945).

While it is true that one's interest in maintaining a driver's license is sufficient to warrant due process considerations prior to termination, *Bell v. Burson,* 402 U.S. 535 (1971), the right to drive an automobile upon the public highways is not an absolute right. "Repeatedly we have recognized the legislature's prerogative to subject a licensed driver to reasonable governmental restrictions in the interest of public health, safety and welfare." *Heninger v. Charnes,* 200 Colo. 194, 200, 613 P.2d 884, 888 (1980).[7] The Colorado Supreme Court entertained a due

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[7] It is almost without question that the state has a vital interest in being able to regulate adequately those driving on its highways. The potential for death and destruction from motor vehicles is great. To further a goal of ensuring that only those able to drive properly are on the roads, the state needs a form of identification. Experience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the in-

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process claim relative to the state's authority to revoke the driver's license of a habitual offender. It found that the doctrine of unconstitutional application would require a demonstration of interference of rights arising under the state or federal Constitution. The claim was rejected, noting that the right to drive is not absolute. 200 Colo. at 200, 613 P.2d at 888.

In examining a Massachusetts statute mandating the suspension of a driver's license for refusal to submit to a breath analysis test, the governmental function was described as follows:

> Here, as in Love, the statute involved was enacted in aid of the Commonwealth's police function for the purpose of protecting the safety of its people. As we observed in Love, the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from Bell v. Burson, . . . on which Montrym and the District Court place principal reliance. . . . We have traditionally accorded the states great lee-

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tegrity of identification of drivers was in some doubt. Photographic licenses help to resolve this problem. In addition, the state has a vital interest in ensuring that alcoholic beverages are not sold to minors who in turn may be operating motor vehicles on the streets and highways while impaired by the effects of alcohol.

The security of financial transactions also rises to the level of a compelling interest. The statutes cited earlier illustrate a concern with the misuse of financial instruments. Many such misuses could be prevented by accurate identification of the maker of the instrument, and operator's license are a frequently used form of identification for these transactions. As the photographic license serves a purpose of more accurate identification, it furthers a vital state interest.

Quaring v. Peterson, district court opinion, Pet.Cert. A12.

way in adopting summary procedures to protect public health and safety.

Mackey v. Montrym, 443 U.S. 1, 17 (1979). Nebraska's requirement of a photographic driver's license is directly related to the public welfare and safety of its citizens.

Assuming that the requirement does infringe upon the free exercise of Quaring's beliefs, the state's interests are of sufficient magnitude to outweigh any alleged burden. First, the privilege of driving is a highly regulated activity, subject always to the state's broad police powers and administrative and judicial sanctions such as suspension or revocation. Second, the photograph requirement is directly related to public safety and welfare and is compelling in the constitutional sense, as was held by the court below. Finally, a photograph is a unique identifier and no substitute will provide a police officer with "ready and instantaneous" means of identification. *Johnson v. Motor Vehicle Division, supra.* Therefore, the state's interest should be found to be of such a compelling nature so as to outweigh any incidental infringement on Quaring's free exercise of her religion.

The third prong of the inquiry is whether or not there exists a least restrictive alternative to the state's requirement of a photograph. *Thomas, supra.* Assuming that the photograph requirement is an infringement upon the free exercise of religion, the requirement must still be upheld for the reason that the lower court's judicially mandated exemption presents insurmountable and impermissible obstacles to the administration of the state's issuance of driver's licenses. In reality, less restrictive alternatives are almost always available, provided that the state is willing to sacrifice effectiveness Although

frequently used as a test, it is not clear what role the concept of "least restrictive alternatives" plays in First Amendment jurisprudence. Courts can frequently decide cases which raise First Amendment questions without appealing to the less drastic means test. However, most cases are decided on a balancing test of the conflicting values and interest.

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. at 377. *See also*, Note: Less Drastic Means and the First Amendment, 78 Yale Law Journal 464 (1969).

The Eighth Circuit found that the denial of a non-photographic license to Quaring does not represent the least restrictive means available to accomplish the state's objective. It is unclear in the lower court's opinion, as well as in other case law, what showing is necessary by the government to prove that no other alternative is feasible. It was the testimony of Colonel Kohmetscher, Superintendent of the Nebraska State Patrol, that no other means of identification was an effective alternative to the photographic driver's license. The photograph is a unique identifier and its effectiveness has been demonstrated by a decline in the counterfeiting and misuse of licenses previously experienced (R101:9-105:18).

Additionally, the administration of applications for exemptions would be cumbersome, costly, and would very likely result in disparate treatment. Nebraska's licenses are issued in 93 counties across the state. Every examiner would need to be trained in order to process applications for exceptions, or all would have to be processed centrally through the mail. No indication is given as to the criteria to be used to determine sincerity or eligibility. The Eighth Circuit implies that the record below is insufficient to support Nebraska's position that the creation of exemptions, solely on religious grounds, would render the entire statutory scheme unworkable. However, the critical inquiry is the ability of the state to make *any* evaluation in this area. The difficulty in distinguishing truly religious objectors from those making false claims should weigh heavily in a judicial evaluation of the governmental interest at issue. This is compounded by the fact that any determination as to sincerity of belief in individual cases will frequently be arbitrary.

The court below characterized Quaring's belief as "unusual in the twentieth century. . .", a point the dissent deems significant. This Court has abandoned a narrow and conventional view of religion. However, the expansive treatment which has followed has made it exceedingly difficult and potentially more intrusive to evaluate an individual's belief. The invocation of undue administrative burden is particularly appropriate in this instance where there is also the broad possibility of error in assessing individual claims. Clark, *Guidelines for the Free Exercise Clause,* 83 Harv.L.Rev. 327 (1969).

Perhaps of greater significance is the impropriety of having Nebraska officials determine, on a case-by-case

basis, the religiosity and sincerity of individual beliefs. While asserting the ease with which this can be accomplished, the court below did not examine the dangerous arena into which Nebraska's administrators have been thrust. The situation is compounded by the very nature of the inquiry necessary in order to determine whether or not an exemption should be granted on religious grounds. In the early case of *Cantwell v. Connecticut,* 310 U.S. 296 (1940), this Court expressed a grave concern that government officials ought not have the capacity to determine whether or not certain causes are religious in nature.

> It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the state; that he is *empowered to determine whether the cause is a religious one,* and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

(Emphasis added); [illegible] 35.

Given the unusual nature of Quaring's belief, and the willingness of courts to recognize individual and personal beliefs not rooted in recognized and established religions, it becomes apparent that the task set out for Nebraska officials is insurmountable and impermissible. Further, a distinction should be drawn between those actions by a

government agent which are ministerial as opposed to discretionary. In the event that a government official exercises discretion in determining the religious nature of a cause, his actions constitute a prior restraint and lay a forbidden burden upon the exercise of liberty protected by the Constitution. It is axiomatic that governmental questioning of the truth or falsity of beliefs is proscribed by the First Amendment. Further, the difficulty of an investigation of an applicant requesting an exemption is seriously compounded when the relevant belief does not, on its face, fit any generally recognizable religious framework. *Stevens v. Berger*, 428 F.Supp. 896. (E.D.N.Y. 1977).

Comment is made that the evidence does not reflect that a great number of applications for similar exemptions have been made. The danger of reaching a decision based upon such sketchy information is obvious. In determining the additional costs to government, the court must necessarily engage in a highly intuitive process to evaluate the resultant burden on state government. Despite this danger, language concerning the number of possible claimants appears in several decisions. Justice Harlan, in his dissent in *Sherbert v. Verner*, treated the assertion that a constitutional privilege should depend on the number of persons claiming it with an air of incredulity, "[S]urely this disclaimer cannot be taken seriously, for the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartanburg had been gainfully employed, or if the appellant's religion had prevented her from working on Tuesdays instead of Saturdays." 374 U.S. at 420-421, n. 2. In this particular instance, the purpose of the statute

is clearly secular, and government is ill-equipped to determine either the sincerity or the religiosity of the claimant's belief. In that situation, "where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv.L.Rev. 327 (1969).

Conceding that Quaring's beliefs are "unusual in the twentieth century", the lower court has failed to address the impossibility, much less the impropriety, of forcing administrative officials to determine the religiosity of claims for exemptions. Consequently, it was error to conclude that the incidental infringement on Quaring's belief justified an exemption and that a less restrictive alternative existed in light of the impropriety of administrative determination of religious claims.

III

The creation of an exemption to the photograph requirement, based solely on religious grounds, contravenes the Establishment Clause of the First Amendment.

The mandated exemption for respondent from the photograph requirement is also in violation of the Establishment Clause of the First Amendment. As recently stated in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984):

> The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a

> "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

104 S.Ct. at 1362. The test to be applied is that set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Initially, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. And finally, the statute must not foster an excessive government entanglement with religion. 403 U.S. 612-613. Requiring an exception for Quaring, solely on religious grounds, clearly contravenes the Establishment Clause as it has been interpreted in *Lemon*. *See, also, Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Justice Stewart, in *Sherbert*, expressed concerns as to the violation of the Establishment Clause in holding that unemployment benefits could not be denied based upon the claimant's refusal to work on Saturdays.

> The Court says that South Carolina cannot under these circumstances declare her to be not "available for work" within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.
>
> Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work" within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.

Sherbert v. Verner, 374 U.S. at 414-415. J. Stewart, concurring.

These same concerns were raised in *Thomas v. Review Board*. Justice Rehnquist, dissenting, focused on the recent growth of social welfare legislation which has greatly magnified the potential conflict between the two Clauses. "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment." 450 U.S. at 722. In *United States v. Lee*, Justice Stevens, concurring, noted that:

> [T]he principle reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

455 U.S. at 263, n.2.

The decision below falls squarely within the ambit of the concerns raised above. The lower court effectively required the state to make an exception solely on the basis of a claimant's religion thereby creating a violation of the Establishment Clause.[8]

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[8]An analogy can be drawn between the instant situation and that presented in *Yott v. North American Rockwell Corporation*, 428 F.Supp. 763 (C.D. Cal. 1977). The constitutionality of a particular statute was at issue which required employers to make reasonable accommodations respecting religious observances and practices. The court pointed out that religious

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Interpretations of the Establishment Clause may vary. But, whatever historical position one takes concerning the development of the Free Exercise Clause and the Establishment Clause, the mandate of the Constitution remains viable. "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Villanova Law Review 3 (1978) at 24. The finding of the lower court is that the state is compelled to grant an exemption based *solely* on a claimant's religious belief. The Establishment Clause, of necessity, proscribes the granting of an exemption or the conferring of a benefit based entirely upon the religiosity of the claim.

The sincerity and centrality of Quaring's beliefs, while undisputed, are insufficient to support the exemp-

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freedom and secular governmental approach to religious institutions are guaranteed by the First Amendment.

> The First Amendment allows no such choice. Government simply cannot make the choice—termed reasonable or otherwise—that conduct which lacks either discriminatory intent or discriminatory application can be circumscribed because religious beliefs may oppose its implementation. Faced with such a decision government must declare its neutrality. That neutrality may result in a sacrifice from the individual who adheres sincerely to his religious beliefs. Such sacrifice is, however, self-imposed with the rewards being measured outside our temporal ken. However well-intentioned governmental action may be in an attempt to alleviate this sacrifice it cannot survive the clear command of the First Amendment and its interpretation by the Supreme Court . . . (citations omitted).

Id. at 767.

tion under existing constitutional precepts. The decision is supportive only of a means to a desired end. Regardless of the effect on Quaring and her inability to obtain a driver's license, the clear mandate of the First Amendment precludes the carving out of an exemption to a constitutional statute based solely on her individualized belief.

CONCLUSION

The district court entered an injunction prohibiting the state from refusing to issue Quaring a nonphotographic license and entered judgment accordingly. No stay of the injunction was granted. The decision was affirmed on appeal to the Eighth Circuit. For the reasons set forth above, the state requests that the decision of the circuit court be reversed and that the injunction be dissolved.

Respectfully submitted,

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No. 83-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HOLLY JENSEN, Director and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Petitioners,

—v.—

FRANCES J. QUARING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Did Nebraska's refusal to grant Mrs. Quaring's request for a religious exemption to the statutory requirement that a driver's license contain a photograph of the licensee infringe upon Mrs. Quaring's First Amendment right to freely exercise her religious beliefs?

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STATEMENT OF THE CASE

This case concerns the denial by the State of Nebraska and its officials of the Respondent's application for a valid Nebraska motor vehicle operator's license. Respondent, Mrs. Frances J. Quaring, was refused a driver's license because her religious beliefs do not allow her to submit herself to being photographed. (R.22:2-4). Nebraska officials would not voluntarily grant Mrs. Quaring an exemption to the statutory requirement that, with some exceptions, Nebraska drivers must have their photographs affixed to their respective drivers' licenses. (J.A. 9-10). See Neb. Rev. Stat. § 60-406.04 (Cum. Supp. 1982). This litigation then ensued pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

Frances J. Quaring is an adult, female resident of the State of Nebraska who lives with her husband and son on their family farm

near Shelton, Nebraska. (R.18:20-23, 19:2-11). In addition to her participation in the farming operation, Mrs. Quaring is also a part-time bookkeeper for a business in nearby Gibbon, Nebraska. (R.21:3-11).

Mrs. Quaring had met every substantive requirement for the issuance of a Nebraska motor vehicle operator's license, but Petitioners refused to issue her a license, because she would not allow her photograph to be taken for use on the license as required by the Nebraska statute. (R.21:21-25). The basis for Mrs. Quaring's objection to being photographed for any purpose is her sincerely held religious belief in a literal interpretation of the Second Commandment. (R.23:4-6, 25:4-23). Mrs. Quaring made numerous attempts, through both legislative and administrative State officials, to obtain an exemption from the photograph requirement, but her request for an exemption was

ultimately denied. (Exhibits 1 and 3, R.24:23-25, 25:1-3).

Mrs. Quaring's belief concerning the Second Commandment results from study of the Bible in which she engaged after a family tragedy. (R.26:22-25, 27:1-5). Because of her exercise of this belief, she has no photographs of her only son (R.27:12-13), no television set (R.27:20-21), and no decorations in her home reflecting nature or floral designs. (R.28:2-5). Further, Mrs. Quaring removes labels from foodstuffs that she purchases for her family if those labels bear pictures of the contents of the package. (R.27:22-25). She possesses no likeness of anything in creation. (R.28:6-9).

Mrs. Quaring testified that she would consider it to be a violation of her religious beliefs if she allowed herself to be photographed. (R.29:1-4). She stated that the circumstances surrounding her driver's

application forced her to choose between her belief in the Second Commandment, on one hand, and the ability to obtain the license, on the other hand. (R.29:9-19).

At the time of the trial, Mrs. Quaring had been driving motor vehicles for 20 years. She had never received a traffic citation or been charged with a law violation of any kind. (R.29:20-25, 30:1). During those 20 years, she had been requested to display her driver's license to a law enforcement officer only once. (R.30:2-9).

Mrs. Quaring's religious beliefs are Christian in nature and are based on the view that the Bible is the word of God and that the Bible contains statements of God's will for her life. (R.30:18-25, 31:1-8). Petitioners now concede that Mrs. Quaring's belief is religious in nature and is sincerely held.

The chief examiner for the driver's license division of the Nebraska Department of Motor Vehicles testified at trial that a driver's licensing program which included a photograph exemption would require no change in the department's examination or application. (R.71:5-10). The department files in the central office in Lincoln, Nebraska, do not contain copies or negatives of the photographs displayed on licenses issued. (R.71:20-23).

The associate director of the driver's services division of the Nebraska Department of Motor Vehicles testified at trial that there currently exist several types of licenses that are exempt from the photograph requirement, including school permits, limited special permits, learner's permits, and temporary permits. (R.77:9-11). He further stated that it was the current practice for requests for any exemptions to

licensing requirements to be reviewed and ruled upon in the central department office -- not by the various county treasurers, who are the agents issuing the licenses. (R.78:19-25, 79:1, 82:9-12). He stated that there had been only one or two requests for photograph exemptions, including Mrs. Quaring's. (R.85:4-9). He also stated that it would be possible to develop an administrative form, or an addendum to the current form, to address requests for photograph exemptions. (R.85:20-25, 86:1-25, 87:1-9). The current driver's license form (Exhibit 101) contains notations for the physical attributes or description of the licensee. (R.88:7-10)

The superintendent of the Nebraska State Patrol testified as to the identification purposes served by the driver's license photograph. (R.98:25, 99:9-12). He also testified that a large number of Nebraska

license holders do not have photographic licenses because of the various exemptions noted above. (R.107:2-14).

The district court found that the Petitioners had established two compelling interests in the photographic driver's license -- identification served the interest of public safety and the interest of security of financial transactions. (Pet.Cert. App.12). However, the district court also found that, with respect to Mrs. Quaring's claim of interference with the free exercise of her religious beliefs, the photographic license is not the least restrictive alternative available to the Petitioners to serve these interests. The district court enjoined the Petitioners from refusing to grant Mrs. Quaring a non-photographic license.

The court of appeals affirmed the judgment rendered by the district court,

although the court of appeals characterized the State of Nebraska's interests in the photographic identification of motorists as "important" rather than compelling. (Pet.Cert.App.27). Both the district court and the court of appeals rejected Petitioners' argument that granting the exemption requested by Mrs. Quaring would contravene the Establishment Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly two thousand years individuals have struggled to give meaning to the Biblical injunction: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[1] All too often, Caesars of one stripe or another have claimed the absolute power to dictate the precise contours of God's portion and to prescribe the only acceptable means for delivering it. The Founders of our nation -- and the waves of immigrants who built it into a world power -- were themselves victims of attempts by kings and parliaments alike to deny individuals the right to decide for themselves what each owed to his or her God and how that debt was to be discharged. The dream of a land where Caesar would respect the religious conscience of the individual

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[1] The New Testament, Matthew 22:21.

drove our forebearers to build a new nation and to inscribe as part of its fundamental law respect for the "free exercise" of religion. The Founders realized that substituting popular sovereignty and majority rule for monarchy and aristocracy would not eliminate the age-old tension between God and Caesar, since a political majority infected by intolerance or beset with insensitivity is not immune from violating religious conscience. Accordingly, each of the original United States, as well as the newly formed nation itself, explicitly provided special protection for religious conscience by forbidding the political majority to interfere with the free exercise of religion. This case, which pits an individual's concededly sincere religious aversion to "graven images," drawn from a literal reading of the Second Commandment, against a decision by Nebraska to require

photographs on almost all driver's licenses, tests the strength and durability of the special constitutional protection for religious conscience.

Nebraska -- and the United States as amicus curiae -- argue that individual religious conscience may be overridden by the majority as long as the majority is seeking, in good faith, to advance a legitimate "programmatic" interest of undefined importance, regardless of the minimal impact that a religious exemption would have on the general effectiveness of the government program at issue.

Respondent believes that the Free Exercise clause protects individual religious conscience against even a good-faith exercise of majority will, unless and until the majority demonstrates that deferring to an individual's religious conscience: (1) would have an unfair impact on third persons; or

(2) would genuinely endanger the government's ability to achieve the goals of the program in question.

ARGUMENT

THE STATE MAY NOT FORCE RESPONDENT TO CHOOSE BETWEEN VIOLATION OF HER RELIGIOUS BELIEFS AND POSSESSION OF A VALID DRIVER'S LICENSE

A. Nebraska's Insistence Upon Photographing Respondent as a Condition for Granting Her a Driver's License Constitutes a Substantial Interference With the Free Exercise of Her Religion, Warranting Strict Judicial Scrutiny Under the Free Exercise Clause.

In any free exercise case, three threshhold issues must be considered: first, the belief in question must qualify as "religious;"[2] second, the government's action must place genuine constraints on the exercise of religious conscience;[3] and,

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[2] Thomas v. Review Board, 450 U.S. 707, 713-16 (1981); United States v. Ballard, 322 U.S. 78 (1944).

[cont'd. on next pg]

third, the government's interest must be sufficiently substantial to warrant the possibility that religious beliefs may be overridden.

This case presents no questions concerning the sincere religious nature of Mrs. Quaring's beliefs[4] or the legitimacy of Nebraska's interest in simplifying the process of identifying drivers of motor vehicles.[5]

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[3] Thomas v. Review Board, 450 U.S. 707, 716-18 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963); see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[4] Mrs. Quaring's religious aversion to being photographed stems from a literal reading of the Second Commandment:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. The Old Testament, Exodus 20:4; see also The Old Testament, Deuteronomy 5:8.

[5] The sufficiency of Nebraska's other asserted interest -- assuring the integrity of private

[cont'd. on next pg]

Nebraska does argue, however, that th refusal to renew Mrs. Quaring's driver's license because of her failure to subm to a photographic practice that violates her religious beliefs does not constitute a sufficient interference with those beliefs to warrant scrutiny as an interference with the free exercise of her religion. Nebraska baldly seeks to resurrect the discredited right-privilege dichotomy, which once authorized the government to condition an individual's receipt of government "privileges" on the waiver of significant constitutional rights.

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financial arrangements by state provision of photographic identification that can be used by merchants and banks -- is more problematic. It is unclear whether the State may legitimately seek to advance the security of private financial arrangements by forcing individuals to act in violation of sincerely held religious beliefs. Not surprisingly, therefore, Nebraska has all but abandoned that justification in its submission to this Court.

Given the extent to which the ability to operate an automobile is a virtual necessity of modern rural life -- both professionally and personally[6] -- and given the close relationship between physical mobility and the constitutionally protected right to travel, it is doubtful whether even the discredited right-privilege dichotomy could have insulated Nebraska's refusal to re-issue Mrs. Quaring's driver's license from searching scrutiny under the Free Exercise clause. More fundamentally, this Court has explicitly rejected the notion that the government may condition receipt of a significant government entitlement on a waiver of religious conscience. As the Court noted in Sherbert v. Verner, 374 U.S. 398, 404 (1963) (footnote

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[6] The record makes clear that Mrs. Quaring's livelihood as both a part-time bookkeeper and a farmer depends on her ability to drive a car.

omitted):

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

In both Sherbert v. Verner and Thomas v. Review Board, 450 U.S. 707 (1981), states sought to justify refusals to pay unemployment compensation to persons whose lack of employment stemmed from the exercise of religious conscience on the ground that government "privileges," such as unemployment compensation and, presumably, driver's licenses, could be withheld from persons whose religion made it impossible for them to comply with otherwise valid eligibility criteria. Claiming that mere denial of benefits did not compel an individual to violate religious conscience, South Carolina and Indiana argued in Sherbert and Thomas that their unemployment compensation programs did not violate the Free Exercise clause. In

both Sherbert and Thomas, however, the Court explicitly rejected the argument that Free Exercise protection applies only against overt State compulsion. The Court recognized that religious freedom is seriously implicated by the coercive effect of a state's attempt to condition the receipt of significant benefits on a waiver of religious conscience. Cf. Pickering v. Board of Education, 391 U.S. 563 (1968) (public employees do not waive free speech rights); FCC v. League of Women Voters, 82 L.Ed.2d. 278 (1984) (applying First Amendment scrutiny to loss of what under prior law would be a mere "privilege"). Accordingly, where, as here, the government "privilege" at issue is of great significance to the individual, Nebraska cannot escape scrutiny under the Free Exercise clause by characterizing its denial of a driver's license as a mere "indirect" interference with Mrs. Quaring's

religious beliefs. Whether characterized as a "direct" or an "indirect" interference, the reality is that Nebraska has forced Mrs. Quaring to choose between her religious conscience and her ability to drive an automobile. Nebraska's power to confront Mrs. Quaring with such an unpleasant choice must be measured not by the conclusory use of labels like "privilege" and "indirect," but by the traditional test of asking whether Nebraska's interest in denying Mrs. Quaring a religious exemption is sufficiently compelling to justify overriding her religious conscience.[7]

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[7] The two state courts to have considered this issue both agreed that conditioning the grant of a driver's license on a waiver of religious conscience warranted scrutiny under the Free Exercise clause to determine whether the State's refusal to grant a religious exemption was justified by a compelling state interest. Colorado upheld the denial; Indiana struck it down as a violation of free exercise. Compare Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363 (upholding denial of religious exemption), cert. denied, 444 U.S. 885 (1979), with Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 1225 (1978)
[cont'd. on next pg]

B. Nebraska's Refusal to Permit Mrs. Quaring to Receive a Driver's License Unless She Compromises Her Religious Beliefs Violates the Free Exercise Clause, Because Granting Her a Religious Exemption From Being Photographed Would Neither Adversely Affect Third Persons Nor Seriously Endanger the Goals of the Photograpic Licensing Program.

The existence of the three elements of a free exercise case -- a sincerely held religious belief; a government decision that impinges on that belief; and a plausible government explanation for the decision -- is, of course, merely the starting point for the difficult question of deciding when a legitimate government interest can override a sincerely held religious belief.

Nebraska and the United States as amicus curiae would terminate the analysis before it begins, by arguing that the existence of a legitimate governmental programmatic interest

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(requiring religious exemption).

justifies overriding individual religious conscience in virtually every case, without considering the actual or likely costs to the program of exempting individuals on religious grounds. Such an approach would reduce the protection of the Free Exercise clause to an admonition against irrational or unreasonable legislation. However, if there is one clear message which the Founders wished the Free Exercise clause to send, it was a message that the majority may not infringe on religious conscience, even when the majority believes it reasonable to do so. One hardly needs an explicit Free Exercise clause to guarantee religious conscience solely against irrational or unreasonable majority action.

On the other hand, an ordered society cannot tolerate the unlimited exercise of individual religious conscience without risking society's very existence. Accordingly, it is clear that situations

exist which would justify Nebraska in refusing to defer to a claim for a religious exemption from an otherwise valid obligation of citizenship.

Not surprisingly, therefore, the Court has rejected the extremes of "always" and "never" and has permitted the government to override a sincerely held religious belief only when the state has demonstrated that granting of a religious exemption would either adversely affect third persons or threaten the integrity of the program at issue.

The Court has upheld Free Exercise claims at least seven times in the years since the First Amendment has been applicable to the States.[8] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Cantwell v.

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[8] Prior to the enactment of the Fourteenth Amendment, the Free Exercise Clause was held inapplicable to the States. Permoli v. New Orleans, 47 U.S. (3 How.) 589 (1845).

Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981). Free Exercise claims have been rejected in eight principal cases. Reynolds v. United States 98 U.S. 145 (1878);[9] Jacobson v. Massachusetts, 197 U.S. 11 (1905);[10] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); Gillette v. United States, 401 U.S. 437 (1971); United States v. Lee, 455 U.S. 252 (1982); Bob Jones University v. United

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[9] See also Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

[10] See also Zucht v. King, 260 U.S. 174 (1922).

States, 76 L.Ed.2d 157 (1983).[11] When one compares the fifteen cases, the principles governing the disposition of this case come sharply into focus.

The Court's recognition of free exercise claims has taken place in contexts where deference to religious conscience did not impose unfair disadvantages on third parties and did not endanger the success of the government program at issue.

The Court's rejection of free exercise claims has taken place in contexts where deference to religious conscience would adversely affect third parties and would pose a credible danger to attaining the goals of the program at issue.

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[11] Heffron v. ISKCON, 452 U.S. 640 (1981), and Widmar v. Vincent, 454 U.S. 263 (1981), involved claims of free exercise of religion as well. The Court, however, analyzed the cases solely in free speech terms.

Thus, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), Oregon asserted a governmental interest in establishing a uniform system of compulsory public education and sought to prohibit parents from sending their children to private religious schools. This Court upheld the constitutional claims of parents wishing to send their children to parochial schools, noting that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.

268 U.S. at 535.[12] In Pierce, the significant state interest in an adequate education was obvious. The mere existence of

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[12] Strictly speaking, Pierce did not involve free exercise claims, since the Court had not yet held the First Amendment applicable to the States. However, the Court's due process "liberty" analysis tracked what a modern court would call free exercise rights.

such a valid "programmatic" interest did not end the analysis, however, since the state's legitimate interest in adequate education was not threatened by permitting certain parents to send their children to qualified parochial schools.

Similarly, in Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court ruled that the Free Exercise clause protected Cantwell's religious prosyletizing despite a legitimate governmental interest in regulating charitable solicitation and in preserving the public peace. As in Pierce, the mere existence of a legitimate government interest did not justify the restrictions in Cantwell, because the government's interest was capable of advancement by means that did not infringe on Cantwell's religious freedom.[13]

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[13] Cantwell appears to be the first instance in which the Court explicitly rested a decision invalidating a state regulation on free exercise [cont'd. on next pg]

In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court invalidated a licensing fee imposed by a municipality on Jehovah's Witnesses engaged in door-to-door propagation of their faith, ruling that the fee violated the Free Exercise clause.

In West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Court, reversing Minersville School District v. Gobitis, 310 U.S. 586 (1940), ruled that West Virginia could not suspend a Jehovah's Witness from public school for refusing to pledge allegiance to the American flag. In Barnette, no one questioned the legitimacy of using the flag salute to inculcate patriotism in school children. Despite the legitimacy of the government interest, however, and the

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grounds. In Cantwell, the Court abandoned the rigid belief-action distinction that had characterized some of the Court's earlier free exercise decisions. See, e.g., Reynolds v. United States, 98 U.S. 145, 166 (1878).

plain fact that it could not be fully advanced if some children could refuse to salute the flag, the Court declined to permit West Virginia to override religious conscience, since, as in Pierce, the state's general educational objective of inculcating patriotism was not threatened by the grant of individual religious exemptions from compulsory flag salutes.

In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist refused to work on her Sabbath and was forced to resign from a job that required Saturday work. The Court ruled that South Carolina's refusal to permit her to qualify for unemployment compensation violated the Free Exercise clause. South Carolina's legitimate interest in protecting the financial integrity of the unemployment compensation fund and in preventing fraudulent claims was, of course, undisputed. But, as in Pierce and Barnette,

the State was unable to demonstrate that deferring to an individual's religious conscience would pose a serious threat to the advancement of South Carolina's legitimate interests.

In Wisconsin v. Yoder, 406 U.S. 205 (1972), Amish parents refused to send their children to school beyond the eighth grade and were threatened with sanctions for violating Wisconsin's compulsory attendance laws. This Court ruled that the Free Exercise clause required Wisconsin to exempt the Amish because the legitimate state interests served by compulsory attendance laws were not materially threatened by deferring to the sincerely held religious beliefs of Amish parents. Yoder stands, therefore, as an extraordinary reminder that the existence of a valid programmatic interest is merely the beginning of the Free Exercise inquiry, for, if the State's general

programmatic interest is not unduly threatened by deferring to individual claims of religious conscience, the State must respect the claim.[14]

Finally, in Thomas v. Review Board, 450 U.S. 707 (1981), a Jehovah's Witness steel-

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[14] Inexplicably, the brief amicus curiae submitted on behalf of the United States does not cite or discuss Yoder. It is, of course, impossible to square Yoder's insistence upon close scrutiny of whether the State's interests are, in fact, threatened by individual religious exemptions with the Solicitor General's attempt to reduce free exercise protection to an inquiry into the importance of the government's programmatic interest. It is precisely the task of the Free Exercise clause as interpreted in Yoder to force the State to explain why a grant of religious exemption in individual cases would threaten the attainment of the program's general goals. In considering the probable impact of a religious exemption, the government and courts need not blind themselves to the number of persons likely to claim an exemption; to the extent that the Solicitor General makes this point, he is not incorrect. But there is no occasion for loose speculation about possible abuse of the religious exemption. See Sherbert v. Verner, 374 U.S. at 406-08. The focus is properly on whether a particular exemption is likely, given its nature, to lead to third-party costs or to widespread abuse. See United States v. Lee, 455 U.S. at 260-61; see generally Freed and Polsby, Race, Religion, and Public Policy: Bob Jones University v. United States, 1983 Sup. Ct. Rev. 1, 20-30.

worker resigned when he was transferred from a foundry to a department producing turrets for military tanks. This Court ruled that Indiana's refusal to permit him to qualify for unemployment compensation violated the Free Exercise clause. As in Sherbert v. Verner and Wisconsin v. Yoder, the legitimacy of the state's interest in maintaining a solvent fund and in deterring fraud was undisputed. However, as the Chief Justice noted, "[w]hen the focus of the inquiry [was] properly narrowed," Indiana was unable to demonstrate anything except wholly speculative threats to its legitimate interests. 450 U.S. at 719.

When one applies the principles derived from Pierce, Cantwell, Murdock, Barnette, Sherbert, Yoder and Thomas to Nebraska's refusal to recognize Mrs. Quaring's claim of religious conscience, the parallels are readily apparent. Nebraska's legitimate

interest in securing more efficient identification of the driving public is hardly threatened by exempting a few religious individuals from the photographic requirement. There is surely no incentive to concoct false religious claims here, as there might be in cases seeking exemption from taxes of general applicability. Cf. United States v. Lee, 455 U.S. at 263 n.3 (Stevens, J., concurring). The vast bulk of drivers will continue to be photographed and even the few religious exemptees will carry written descriptions of identity that provide an adequate alternative means of identification -- an effective means used by New York as recently as 1984 and by most states for decades.[15] Nebraska has itself exempted

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[15] The Solicitor General argues that it is inappropriate to consider whether large numbers of persons are likely to claim an exemption because the grant or denial of a free exercise claim should not turn on the number of adherents. However, it is the essence of free exercise inquiry to determine what the actual cost to the State of granting a religious [cont'd. on next pg]

learners' permits, farm machinery licenses and several other categories of drivers' licenses from the photographic requirement, rendering it even less likely that a religious exemption would materially interfere with the attainment of the program's general goals. Indeed, the threat to Nebraska's legitimate interests which would be posed by granting Mrs. Quaring a religious exemption is far less significant than the asserted threats in Sherbert, Yoder

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exemption is likely to be and to determine whether that actual cost threatens the attainment of the State's goals. Closing one's eyes to the number of potential applicants for an exemption makes it impossible to engage in the required analysis. E.g., Thomas v. Review Board, 450 U.S. at 719. Nor is it strange that widespread or mainstream religious beliefs will be less likely to prevail under such an analysis. Mainstream faiths have shown themselves more than capable of defending their interests in the political process. It is precisely because faiths with relatively few adherents are notoriously unable to defend themselves in the legislative arena that the Free Exercise clause was initially adopted. Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); J. Ely, Democracy and Distrust 100 (1980).

and Thomas, none of which justified overriding religious conscience.

On the other hand, in rejecting free exercise challenges to anti-polygamy laws,[16] compulsory vaccination statutes,[17] child labor laws,[18] compulsory military training and service,[19] Sunday closing laws,[20] and tax status,[21] the Court has stressed that

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[16] Reynolds v. United States, 98 U.S. 145 (1878); see also Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

[17] Jacobson v. Massachusetts, 197 U.S. 11 (1905); see also Zucht v. King, 260 U.S. 174 (1922).

[18] Prince v. Massachusetts, 321 U.S. 158 (1944).

[19] Gillette v. United States, 401 U.S. 437 (1971); see also Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

[20] Braunfeld v. Brown, 366 U.S. 599 (1961). Braunfeld is couched in right-privilege terms, rendering its current vitality as a precedent highly questionable. Even if Braunfeld remains good law, however, it is clearly distinguishable from this case since, unlike Braunfeld, granting a religious exemption to Mrs. Quaring would not adversely affect third persons and would not endanger the goals of the government program in question.

[21] Bob Jones University v. United States, 76 L.Ed.2d [cont'd. on next pg]

granting the requested exemptions would have both adversely affected third persons and would have posed a serious threat to the government programs at issue.

United States v. Lee, 455 U.S. 252 (1982), is illustrative of these cases. There, the Court rejected a claim by Amish employers to a religious exemption from the payment of Social Security taxes. As in Reynolds, Jacobson and Prince, exempting Amish employers in Lee would have adversely affected several categories of third persons, including employees whose Social Security coverage would have been affected and competitors who would have been placed at an economic disadvantage. Finally, granting religious exemptions from the payment of Social Security taxes was deemed by the Court to threaten the principle of universality on

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157 (1983); United States v. Lee, 455 U.S. 252 (1982).

which the Social Security system rests. 455 U.S. at 260. Moreover, there was a substantial likelihood in Lee's tax context, as there is not here, that individuals might falsify religious claims, leading to severe (and entangling) administrative problems. See id. at 263 n.3 (Stevens, J., concurring.) Thus, Lee provides no support for Nebraska's refusal to recognize Mrs. Quaring's request for a religious exemption. In fact, as the Court noted in Lee, when no third persons were adversely affected Congress granted a religious exemption from Social Security taxes to self-employed Amish. 455 U.S. at 260-61; see 26 U.S.C. § 1402(g).

The principle that emerges from the Court's free exercise cases is a clear one: An individual is entitled to a claim of religious exemption from an otherwise valid obligation of citizenship unless the State

can demonstrate that third persons would be seriously disadvantaged or that the exemption threatens the attainment of the general goals of the program in question.[22] Tested by such a principle, Nebraska's insistence on forcing Mrs. Quaring to choose between her religious conscience and her ability to drive an automobile violates the Free Exercise clause.

C. The Courts Below Correctly Found That the State's Interest in Assuring the Identification of Mrs. Quaring Could Be Served By Means that Would Not Violate Her Religious Belief.

Respondent has demonstrated that the grant of a religious exemption to Mrs. Quaring and to others likely to request such

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[22] The same principle has been applied in First Amendment speech cases: an individual is entitled to an exemption from an otherwise valid obligation of citizenship where the obligation burdens the exercise of important speech interests, unless the exemption would threaten attainment of the general goals of the program. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Brown v. Socialist Workers '74 Campaign Commititee, 459 U.S. 87 (1982).

an exemption would not adversely affect third persons or endanger the general goals of Nebraska's photographic licensing program. Nor would it seriously interfere with Nebraska's interest in assuring that Mrs. Quaring remains readily identifiable while driving a car. Respondent does not believe that Nebraska's interest in maximizing identifiability is a "compelling" one. See Quaring v. Peterson, 728 F.2d 1121, 1126-27 (8th Cir. 1984) (Pet. App. 27-29); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 125 (1978). But even if the state's interest were compelling, religious exemptees can be identified by means that do not violate religious conscience. When, as here, free exercise of religion is at issue, the Constitution requires an inquiry into whether the means employed to serve the government's interests represent the least restrictive

alternative for achieving the desired end. Thomas v. Review Board, 450 U.S. at 718.

First, it is clear that no administrative hurdle prevents religious dissenters from identifying themselves by means other than a photograph.

The record reflects that the administrative machinery already is in place for the procedures required to accommodate Mrs. Quaring's religious belief. There simply would be no significant administrative burden created by the district court's decision requiring such accommodation. At most, the Department of Motor Vehicles may have to devise a form for persons desiring a photograph exemption. The state central licensing office is already in daily contact with licensing stations, and procedural directives are issued from the central office to county treasurers on a regular basis. Following the entry of the district court's

judgment, the Department of Motor Vehicles arranged for Buffalo County, Nebraska, officials to issue a non-photographic license to Mrs. Quaring. Only administrative inconvenience that renders an entire statutory scheme unworkable will be sufficient to prevent the implementation of a less restrictive alternative when such an alternative will not threaten the state interests underlying the statute. Sherbert v. Verner, 374 U.S. at 409.

The Minnesota Supreme Court addressed an analogous situation in In re Jenison, 265 Minn. 96, 120 N.W.2d 515, vacated and remanded, 375 U.S. 14, on remand, 267 Minn. 136, 125 N.W.2d 588 (1963). Jenison involved a claim for a religiously based exemption from jury duty. In its first opinion, the Minnesota court held that such an exemption would present administrative difficulties of the same sort asserted by the Petitioners in

the instant case. This Court vacated that decision and remanded the case for further consideration in light of Sherbert, supra. On remand, the Minnesota court, properly following the analysis articulated in Sherbert, held that the State had not adequately shown that the requested exemption would result in an inability to obtain competent jurors. The court said:

> Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall hence forth be exempt.

Jenison, supra, 125 N.W.2d at 589. It is equally clear from the record in the instant case -- as the court of appeals correctly decided -- that the exemption sought by Mrs. Quaring will not create an administrative burden which will render Nebraska's drivers' licensing program unworkable.

Second, the use of written descriptions of the physical characteristics of religious exemptees such as Mrs. Quaring would scarcely inconvenience the Motor Vehicle Department and would permit effective identification of a driver. While a written description of physical characteristics is not completely equivalent to a photograph, it is an adequate substitute for those few individuals whose religious consciences preclude their being photographed. In fact, the use of a written description of physical characteristics is at least as acceptable an alternative as was the vocational training in Yoder that was deemed a sufficient substitute for high school education. Wisconsin v. Yoder, 406 U.S. at 225-27.

With regard to the other state interest found by the lower courts, there has been no showing whatsoever that Mrs. Quaring represents any threat to the security of

financial transactions. If anyone is inconvenienced or handicapped by the accommodation granted below, it is the person issued a non-photographic license. Merchants are free to demand whatever identification they deem appropriate and sufficient when their customers seek to cash checks. If merchants demand photographic identification, it is the person without the photograph who is disadvantaged -- not the merchant, and certainly not the State.

D. No Violation Of The Establishment Clause Occurs If Nebraska Officials Are Required To Grant Mrs. Quaring An Exemption From The Photograph Requirement Or If Those Officials Are Required To Establish Criteria On Which To Base Grants Or Denials Of Exemptions To The Photograph Requirement.

Granting Mrs. Quaring an exemption involves neither participation by the government in her belief nor a governmental endorsement of the belief. By granting Mrs.

Quaring a non-photographic driver's license, the government merely recognizes the validity of her assertion that her personal attempts to live a life consistent with her beliefs are shielded from governmental interference -- direct or indirect -- by the Free Exercise clause.

Nebraska insists upon arguing that recognition of Mrs. Quaring's claim to religious conscience would violate the Establishment Clause. Wholly apart from the incongruity of such an argument by a State that insists on maintaining a paid State Chaplain, see Marsh v. Chambers, 77 L.Ed.2d 1019 (1983), this Court has repeatedly rejected claims that state accommodation of Free Exercise claims violates the Establishment Clause. See, e.g., Thomas v. Review Board, 450 U.S. at 719-20; Wisconsin v. Yoder, 406 U.S. at 220-21; Sherbert v. Verner, 374 U.S. at 409. An argument similar

to the one advanced here by the Petitioners was presented to the Court in Yoder, supra. In agreeing with the Court's rejection of the view that accommodating the religious practice at issue in Yoder would constitute an establishment of religion, Justice White wrote:

> Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective.

Wisconsin v. Yoder, 406 U.S. at 240-41 (White, J., concurring).

CONCLUSION

For all of the foregoing reasons the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate who is awaiting admission to the New York Bar, in the research and preparation of this brief.

No. 83-1944

IN THE

Supreme Court of the United States

October Term, 1984

HOLLY JENSEN, Director and
WILLIAM J. EDWARDS, Deputy Director
Department of Motor Vehicles, State of Nebraska,

Petitioners,

vs.

FRANCIS J. QUARING,

Respondent.

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF AFFIRMANCE

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BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA

Interest of the *Amici*

This brief is submitted with the consent of the parties by the American Jewish Congress and the Synagogue Council of America. AJCongress is a national organization of American Jews, founded in 1918 to protect the religious, civil, political and economic rights of Jews and to promote

the principles of democracy. The AJCongress' interest in this case arises from its long-standing commitment to the First Amendment's guarantee of religious liberty, which is dependent no less on the guarantees of the Free Exercise Clause than those of the Establishment Clause.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

This case raises three issues. The first is largely factual and is peculiar to this case—whether the state has a compelling interest in insisting that all those who seek to secure a driver's license allow themselves to be photographed, including those with religious objections to photographs. The broader, and more important, issues raised by petitioner are: 1) whether the Free Exercise Clause mandates that states, in administering programs which confer benefits on their citizens, must excuse compliance with a re-

quirement of general applicability to accommodate the religious practices of religious minorities, even if there is no fundamental right to the benefit conferred by the statute; and 2) whether any such exemption would run afoul of the Establishment Clause by preferring religion over non-religion, or by requiring intrusive inquiries into the sincerity of those invoking the Free Exercise Clause.

The Solicitor General, in an *amicus* brief filed on behalf of the United States, urges a radical restructuring of Free Exercise doctrine. Under the Solicitor's approach, the burden in Free Exercise cases would shift from the cost to government of allowing an exemption to the importance of the challenged governmental practice. Only if the entire program could be redesigned without substantial cost to the effectiveness of the program would Free Exercise claims be honored.

All of these issues are of importance to American Jews who frequently find it necessary to seek such exemptions. Because the law as it is presently understood by public officials allows for, and often requires, such exemption, Jews and other religious minorities have been able to freely observe the dictates of their religion without being forced to turn down governmental benefits generally available to all.

Acceptance of Nebraska's arguments on either of the broader issues, or agreement with the Solicitor General's rewriting of the law of Free Exercise, would substantially alter that state of affairs to the disadvantage of American Jews and members of other religious minorities. Such a result would severely diminish the vitality of religion in this country, stifling the growth of new forms of religious

practice and experience. A reversal of the judgment below would be as harmful to religious liberty as an abandonment of the Establishment Clause.

Summary of Argument

Respondent's request to be excused, for religious reasons, from Nebraska's requirement of a photograph on drivers' licenses expressly falls within the protection of the Free Exercise Clause of the First Amendment. Petitioners' assertion that a religiously based exemption from a generally applicable statute constitutes a preference for religion, and, therefore unconstitutionally establishes religion, is wholly without merit. This Court has categorically rejected precisely that argument in a long line of cases from the *Selective Draft Law Cases,* 245 U.S. 366 (1918) to *Thomas* v. *Rev. Bd.,* 450 U.S. 707 (1981).

In addition, Respondent is not asserting a right to a drivers' license, but rather a fundamental Free Exercise right to be excused from the photograph requirement. Faced with this simple request to permit accommodation of a religious choice, petitioners must demonstrate a compelling state interest for requiring photographs on each and every drivers' license without exception. Nebraska is unable to meet that burden of proof. Neither the state's interest in facilitating financial transactions and highway identification, nor its interest in avoiding administrative headaches, is sufficient to outweigh a citizen's right to Free Exercise of religious liberty. And any inquiry as to sincerity is not unduly entangling.

ARGUMENT

I.

Granting An Exemption From A Statute of Neutral Application Does Not Establish Religion

Introduction

Petitioners argue that any religiously based exemption from a generally applicable statute would treat religion preferentially and, therefore, necessarily unconstitutionally establish religion. Their argument tracks that of Professor Kurland, *Religion and the Law of Church and State and the Supreme Court* (1962) that the religion clauses are to be read together to impose a principle of neutrality, under which religion is not a basis for governmental classification, either to benefit or disadvantage religion. That argument is, of course, not new; on the contrary, as we demonstrate below, it has been frequently raised, and just as frequently rejected.

A. *This Court Has Held That Free Exercise Accommodation Is Not Necessarily An Establishment of Religion*

The need to reconcile the Establishment and Free Exercise Clauses became evident as the Free Exrcise Clause was expanded to protect religiously motivated action in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940), which unambiguously rejected the argument, accepted by this Court in *Reynolds**

* The overruling of *Reynolds*' belief/action dichotomy does not dictate a different result on the facts of that case, as this Court noted in *Sherbert* v. *Verner*, *supra*, 374 U.S. at 403. There, the Court

(footnote continued on next page)

v. *U. S.*, 98 U.S. 145 (1878), that the Free Exercise Clause protected only the freedom to believe, not the freedom to act on those beliefs. At the same time, the Establishment Claus was applied to activities of the modern welfare state substantially expanding its reach. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev.* 1381, 1386-90 (1967).

As a result of those changes, this Court has observed that if both the Establishment and Free Exercise Clauses were expanded to their limits they would clash with each other, *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-69 (1970); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). What is necessary is a balancing of the commands of both clauses so that neither overwhelms the other, and religious liberty is nurtured, *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1361 (1984).

This Court has interpreted the Establishment Clause so as to prohibit government from favoring religion over non-religion, *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Accordingly, the special status conferred on religion by the Free Exercise Clause—allowing those with religious scruples to avoid requirements generally binding on others—raises the spectre of an Establishment Clause violation by treating religion advantageously vis-a-vis non-religion philosophical objections to particular laws.

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placed the *Reynolds* result on the straight-forward ground that there was a compelling governmental interest in outlawing polygamy. Professor Giannella, in his landmark article, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1403-09 (1967), develops the rationale for this result at greater length.

This Court was not blind to this difficulty in *Sherbert* v. *Verner, supra,* but it found the argument so unpersuasive as not to merit prolonged discussion, 374 U.S. at 409:

> "In holding as we do, plainly we are not fostering the "establishment" . . . of religion . . . . [The decision] reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . . . Nor does the recognition of the appellant's right . . . serve to abridge any other person's religious liberties."*

Earlier, this Court gave short shift to the argument that the exemption of ministers and divinity student from the draft established religion by granting a (quite substantial) benefit to religious practices. In the *Selective Draft Law Cases,* 245 U.S. 366, 389-90 (1918), this Court wrote only that the "unsoundness of the [argument] is too apparent" to require discussion.

Braunfeld v. *Brown,* 366 U.S. 599, 608-09 (1961) is particularly instructive. There, this Court rejected a claim that the Free Exercise Clause required Pennsylvania to carve out a Sabbatarian exemption to its Sunday Blue Laws. The Court reasoned, 366 U.S. at 609, that such an exemption might confer a competitive economic advantage on Sabbatarians, thus preferring one religion over another,

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* Justice Harlan (joined by Justice White), while dissenting from the majority's holding that the Free Exercise Clause *compelled* accommodation of Sherbert, agreed that the state *could* as a matter of legislative grace, grant Sherbert unemployment benefits.

In his concurring opinion in *Welsh* v. *United States,* 398 U.S. 333, 344 (1970), Justice Harlan, while not retreating from his position in *Sherbert* v. *Verner* that exemptions did not violate the Establishment Clause, would have held that such exemptions had to be provided to all who held moral objection to a particular practice, lest government prefer religion over non-religion. This Court has since rejected that position, *Wisconsin* v. *Yoder, supra,* 406 U.S. at 215-16.

or would unduly entangle the state in inquiries into the sincerity of those seeking to invoke the exemption—arguments with "substantial roots" in the Establishment Clause, *Welsh* v. *U.S., supra,* 398 U.S. at 372 (White, J., dissenting).

Nevertheless, the Court in *Braunfeld* v. *Brown* suggested that the legislative creation of a Sabbatarian exemption might "well be the wiser solution . . . ." 366 U.S. at 608. The very next year this Court upheld, against an Establishment Clause challenge, Kentucky's Sabbatarian exemption, *Arlan's Dep't Store of Louisville, Inc.* v. *Ky.*, 371 U.S. 218 (1962)—a result which the Court reaffirmed, with only the most cursory of explanations, in *Thomas* v. *Rev. Bd.*, 450 U.S. 707, 719-20 (1981).

B. *This Reconciliation Of The Clauses Is Consistent With The American Constitutional Tradition*

This Court's refusal to interpret the Establishment Clause as prohibiting the accommodation of religiously based action is well grounded in both history and public policy. While the history of the Free Exercise Clause is not as well known as that of the Establishment Clause, what little that is known suggests that the founders did not believe that an exemption for religious conscience would violate the Establishment Clause.

The question of what protection to afford religiously motivated actions arose as early as the drafting of the Declaration of Rights in the Virginia Constitution in 1776, Hunt, *James Madison and Religious Liberty,* American Historical Ass'n Annual Report, 165, 166 (1901) (hereafter Hunt, *Madison and Religious Liberty*). The original draft, prepared by George Mason, protected religious practices

"unless under color of religion any man disturb the peace, the happiness, or safety of society," Hunt, *Madison and Religious Liberty, supra,* at 166.

James Madison, one of the leading advocates of disestablishment at the time, as this Court has repeatedly noted, *see, e.g., Everson* v. *Bd. of Educ., supra,* 333 U.S. at 13-14 urged that this language did not go far enough. He would have permitted Free Exercise guarantees to be invoked unless "under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered." Hunt, *Madison and Religious Liberty, supra,* at 166-67.

As ultimately adopted, the Constitution did not adopt one or the other test, perhaps because there was no consensus on this score, but did incorporate general language protecting religiously motivated actions. *See,* Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 19-22 (1978). What is significant for present purposes is that the Declaration of Rights, as ultimately adopted, embodied a guarantee protecting religious practices which its authors did not find inconsistent with non-establishment.*

The events surrounding the drafting of the Virginia Declaration of Rights are not the sole historical sources

* In Malbin's view, Jefferson disagreed with both Madison and Mason, and, following Locke, would have afforded no special protection to religious action. Malbin concludes that the Free Exercise Clause should be interpreted as embodying Jefferson's views. His discussion is not persuasive, for he does not demonstrate why Jefferson's views, and not those of Madison or Mason, should be regarded as dispositive. And as we demonstrate in the text, there is other historical evidence suggesting that the states had a broader view of Free Exercise than did Jefferson.

which illuminate the First Amendment provisions. Several states objected to ratification of the Constitution on the ground that it did not provide sufficient protection for Free Exercise, *see, e.g.*, Antieau, Downey and Roberts, *Freedom From Federal Establishment*, 111-22 (1964).

State constitutional interpretations should also be considered in interpreting parallel federal provisions, *see*, Kauper, *Religion and the Constitution* 102-03 (1964); Katz, *Religion and American Constitutions* 63-64 (1964). While a few state courts have held that exemptions would 'establish religion,' *see, McGowan* v. *Md.*, 366 U.S. 420, 516-17, n.104 (1961) (Frankfurter, J., concurring) (collecting cases), the majority have considered Free Exercise Claims —sometimes upholding them, sometimes not—without regarding such exemptions as establishments. *See, generally*, Antieau, Carroll and Burke, *Religion Under The State Constitutions* 65-95 (1965).

Moreover, state legislatures frequently granted exemptions by statute. *McGowan* v. *Md.*, *supra*, 366 U.S. at 514-17 (Frankfurter, J., concurring) (collecting Sabbath Blue Law exemption statutes). In sum, the notion that the exemption of religious observers from laws of general applicability does not establish religion is well ingrained in American constitutional law.

C. *Petitioners' Establishment Clause Argument Misconceives The Nature Of Religious Liberty*

The twin provisions of the Constitution regulating church-state relations are together designed to insure "the fullest possible scope of religious liberty." *School District of Abington Twshp.* v. *Schempp*, 374 U.S. 203, 305

(1963) (Goldberg and Harlan, JJ., concurring). While there is no unanimity on the exact parameters of religious liberty, that concept at a minimum means "the right of a person freely to choose those forms of religious belief and expression which represent that individual's innermost expression of faith."*

The Free Exercise Clause contributes to this goal in obvious ways. Similarly, the Establishment Clause, by limiting the involvement of government, furthers religious liberty by insuring that religious choices are made free of government interference (the principle of voluntarism). It ensures that government is not responsive to or an advocate for, only those of one or more faiths.**

The Establishment Clause does not, however, demand "an untutored devotion to the concept of neutrality . . . which partakes not . . . of that noninterference and noninvolvement with the religious, but a brooding and pervasive devotion to the secular." *Id.* 374 U.S. at 306. Nor is it to be applied without regard to the equally compelling demands of the Free Exercise Clause. What the Constitution commands is, as Dean Katz put it, *Religion and American Constitutions, supra,* at 22, "a secular state—but a secular state which does not give preference to sec-

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* Testimony of Dean Norman Redlich, Judge Edward Weinfeld Professor of Constitutional Law, New York University School of Law, Hearings on *Proposed Constitutional Amendment to Permit Voluntary Prayer:* S.J. Res. 199, Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 447 (1982).

** The Establishment Clause also protects the secular integrity of government by insuring that it does not become a captive of religion, *Engel* v. *Vitale,* 370 U.S. 421, 426-429 (1962). We discuss this aspect of the Establishment Clause below in connection with the petitioners' entanglement argument.

ularism and is actively concerned for religious freedom." *cf.* Pfeffer, *The Supremacy of Free Exercise,* 61 Georgetown L. J. 1115 (1973).

The constitutionally mandated "active[] concern[] for religious liberty" compels* government to adjust its affirmative program of regulation to take into account the needs of those citizens whose religious practices are in conflict with majoritarian norms. The accommodation sought here does not interfere with, or influence, anyone else's religious choices; it merely allows the implementation of a prior, purely private, religious choice, *Mueller* v. *Allen,* 103 S.Ct. 3062, 3069 (1983); *Roemer* v. *Bd of Public Works,* 426 U.S. 736, 751 (1976). It does not in any meaningful sense establish religion. *See also, School Dist. of Abington Twshp., supra,* 374 U.S. at 307 (Goldberg, J., concurring (mandatory school prayer not on accommodation); Brief of the American Jewish Congress, *et al.,* in *Wallace* v. *Jaffree,* No. 83-812 at 27-36 (U.S. Sup. Ct., O.T. 1983).

Because the accommodation principle is available as a check on all governmental activity (although Free Exercise claims will not always be vindicated), and indeed has been applied to a wide range of statutes and practices, and on behalf of a multiplicity of different religious beliefs, there is no substantial risk of favoritism to any par-

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* The courts below held that Nebraska *must* accommodate Quaring's religious objections to being photographed. But petitioners' objection to accommodation as an establishment of religion could be made equally well—perhaps with greater force—where the state is not obligated to accommodate religion, but does so as a matter of grace. As *Arlan's Dep't. Store of Louisville, Inc.* v. *Ky., supra,* demonstrates, the argument is no more availing in such cases.

ticular sect or denomination.* Deferral to Quaring's objection by granting the exemption sought here cannot reasonably be seen by her or others as a governmental endorsement of her views, if for no other reason than that the petitioners are compelling all other applicants for a license to submit to the very practice she categorizes as idolatry.

Moreover, accommodating Quaring's concerns imposes no costs at all on others, let alone costs as substantial as those imposed upon others by the conscientious objection exemption, or the exemption from jury duty contemplated by *In Re Jenison,* 375 U.S. 14 (1963), *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963). It affords her no competitive advantage in business, *see, Kings Gardens, Inc.* v. *F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 996 (1974); *Amos* v. *Presiding Bishop,* 35 F.E.P. 1734 (D. Utah 1984), or with respect to some highly and independently desirable, but illegal, good such such drugs. Nor does it permit her to engage in any other conduct considered highly desirable by some, such as racial discrimination, *Bob Jones University* v. *U.S., supra,* 103 S.Ct. at 2037, n.30; Freed and Polsby, *Race, Religion and Public Policy*: *Bob Jones University* v. *U.S.,* 1983 Sup. Ct. Rev. 1 (1983). It infringes on no one elses religious liberty, *Sherbert* v. *Verner, supra,* 374 U.S. at 409.

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* Justice Stevens, concurring in *U.S.* v. *Lee,* 455 U.S. 252, 263, n.2 (1982), suggested that it might be best to eliminate all exemptions in order to avoid the suggestion of favoritism to those groups whose claims are recognized over those whose claims are rejected in the face of a compelling interest. *See also, Bob Jones University* v. *U.S.,* 103 S.Ct. 2017, 2035, n.30 (1983). As stated in the text, and with all respect, we believe this concern to be exagerated. Moreover, it does not give proper weight to the demands of the Free Exercise Clause.

Recognizing a Free Exercise claim here would send no message that religion is relevant to one's standing in the political community, *Lynch* v. *Donnelly, supra,* 104 S.Ct. at 1366 (O'Connor, J., concurring). On the contrary, exemption allows Quaring to participate more fully in an important aspect of day to day living in her community without sending any message to either Quaring or others as to her civic status.

II.

It Is The Right To Free Exercise That Is Essential—Not The Right To A Driver's License

A. *Free Exercise Is A Fundamental Right*

Professor, later Chief Justice, Stone, writing in 1919, eloquently explained that society's decision to respect the religious beliefs of those who cannot in good conscience comply with society's demands, proclaims the supreme significance a society places on the call of individual conscience:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

Stone, *The Conscientious Objector,* 21 Col. Univ. Q. 253, 269 (1919). Because the Free Exercise Clause fulfills this vital function, only interests of the "highest order" defeat claims arising under it.

Of course, the policy of nuturing individual conscience has a price. Sometimes that price is too high to pay and the individual's conscience must yield. But respect for the right of conscience is, as Chief Justice Stone wrote, a high value in itself. It is that value, not the constitutional value of a driver's license, against which petitioners' claim that the price here is too high must be measured.

B. *It Is Irrevelant That There Is No Fundamental Right To A Driver's License*

Petitioners' lengthy argument (Brief 7-20) that there is no fundamental right to a driver's license is quite beside the point, and is nothing more than a repetition of South Carolina's unavailing argument in *Sherbert* v. *Verner, supra,* that unemployment benefits were a privilege, not subject to the Free Exercise guarantee. Unlike cases involving procedural due process, where the courts are called upon to weigh, on a more or less *ad hoc* basis, the nature and significance of an individual's interest in order to determine the extent of the process due, the Constitution itself provides that Free Exercise claims are entitled to the highest level of deference.

Petitioners' assert, that "if, in fact, Quaring is not entitled to a driver's license as a matter of right, her free exercise claim does not arise." (Brief at 9) Although petitioners are surely right that the ability to obtain a driver's license is not fundamental, *San Antonio Ind.*

School District v. *Rodriguez*, 411 U.S. 1, 33-35 (1973), it does not follow, as they argue, that no constitutional restraints apply to the issuance of licenses, *cf. Sherbert* v. *Verner, supra*, 374 U.S. at 404-05. It surely could not be contended, for example, that, because there is no constitutional right to a driver's license, that higher licensing standards for blacks would not violate the Equal Protection Clause of the Fourteenth Amendment.

Similarly, if Nebraska imposed higher standards for obtaining a license on those who believe that Jesus was not the messiah, or on those who believe that he was—in clear violation of the most basic comand of the Free Exercise Clause—the fact that there is no right to a license at all would be no bar to a successful challenge to that requirement, *Torcaso* v. *Watkins, supra.* No different result is called for here because the Free Exercise right asserted involves the protection of action, not belief alone. *Thomas* v. *Rev. Bd., supra; Wisconsin* v. *Yoder, supra; Sherbert* v. *Verner, supra.*

Petitioners' attempts to distinguish *Sherbert* v. *Verner* and *Thomas* v. *Rev. Bd.*, which require the state to accommodate the practice of the religious faithful in the operation of their programs, on the further ground that in those cases the "individuals *were* otherwise entitled" (Brief at 17) to the benefits. This attempted distinction, made by the United States as well, (Brief at 13) is without a factual basis.

In both *Sherbert* and *Thomas* unemployment benefits were not available to those who turned down employment for which they were qualified. Both Sherbert and Thomas

turned down such employment, and were thus not "otherwise entitled" to benefits. *See Sherbert* v. *Verner, supra,* 374 U.S. at 418-20 (Harlan, J., dissenting). It was only because the Free Exercise Clause invalidated application of the statutory prohibition on the payment of benefits to those who turned down employment that Sherbert and Thomas were "otherwise entitled" to unemployment benefits. *Cf. Thomas* v. *Rev. Bd., supra,* 450 U.S. at 723, n.1 (Rehnquist, J., dissenting) (pointing out that *Sherbert* v. *Verner,* 374 U.S. at 401, n.4 had left open whether the same result would accrue under a statute, like Indiana's, with no 'good cause' exception such as contained in South Carolina's statute).

No one questions that Quaring has satisfied all the other requirements for a driver's license, except for the taking of a photograph. She has passed the necessary tests and has demonstrated that she is capable of operating a car safely. She is thus "qualified" to obtain a license, but for her refusal to be photographed. The Free Exercise Clause should excuse her failure to comply with that requirement.

C. *The Refusal To Issue Quaring A License Constitutes Impermissible Coercion*

Free Exercise claims involving the right to practice one's beliefs are of two general types—challenges to those rules which are intended to outlaw a religious practice, *see, e.g., Reynolds* v. *U.S., supra,* and those in which the religious believer's idiosyncratic religious practices prevent him from complying with an affirmative obligation. In the former type of case, which is comparatively rare, the cost imposed on religious beliefs is readily apparent, although so too is the interest of the state.

No less real, though, are the costs imposed in the second class of cases. The burden imposed by neutral state practices which have a disparate impact on followers of a particular religion is substantial. While in such cases the state has not outlawed a religious practice, it imposes on those who observe such practices a substantial cost not imposed on others. In *Sherbert* v. *Verner, supra,* 374 U.S. at 403-04, this Court took note of the constitutional implications of this state imposed tax on religious practice:

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown, supra,* 366 U.S. at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

The plurality opinion in *Braunfeld* v. *Brown, supra,* 366 U.S. at 606, refusing to create a Free Exercise exemption to the Blue Laws for Sabbath observers, is read by petitioners (Brief at 20) as holding that indirect burdens are

not subject to Free Exercise claims. The illustrations cited in *Braunfeld* v. *Brown* as exemplifying this principle all involved burdens which were imposed by laws basic to the very organization of society—taxes, the five day work week and the like. Recognition of a Free Exercise right as against these practices would necesarily be a challenge to the most basic decisions about the way in which society has ordered itself. As the Chief Justice himself recognized, *Id.* at 607, however, this principle does not mean that all indirect burdens on religious practices are devoid of Free Exercise constraints. On the contrary, such practices must be accommodated "if the State may accomplish its purpose by means which do not impose such a burden." As we demonstrate in Point III, the state has not carried its burden, *Sherbert* v. *Verner, supra,* of proving that alternatives which would meet both its needs and those of Quaring are not available.

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* To be sure, there is at least an inconsistency of tone between the treatment of indirect burdens in *Braunfeld* v. *Brown* and *Sherbert* v. *Verner,* as Justice Stewart (374 U.S. at 413) and Justice Harlan (374 U.S. at 421) both observed in *Sherbert.* Since *Sherbert,* however, this Court has always used the *Sherbert* analysis, *see Wisconsin* v. *Yoder, supra,* 406 U.S. at 215; *Thomas* v. *Rev. Bd, supra,* 450 U.S. at 717; *Gillette* v. *U. S.,* 401 U.S. 437, 462 (1971); *U. S. v. Lee, supra,* 455 U.S. at 257-58; *see, generally,* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, supra,* 80 Harv. L. Rev. 1381, 1398-1403 (1967); Kauper, *Religion and the Constitution, supra,* at 41-43; Katz, *Religion and American Constitutions, supra,* at 97-99; Tribe, *American Constitutional Law,* § 14-10, p. 854 (1978). To the extent that these decisions are not reconcilable, the plurality opinion of *Braunfeld* v. *Brown* should be reconsidered.

III.

No Compelling Interest Justifies The Refusal To Grant Quaring An Exemption

A. *The Inquiry Must Focus On The State's Interest In Not Accommodating Quaring*

The crucial question in Free Exercise cases is whether the state has a compelling interest in not accommodating the observer's religious practices. Petitioners offer two such justifications beyond the bold claim, discussed in Point I, *supra,* that any accommodation would violate the Establishment Clause. The first of these is the state's interest in identifying motorists, and providing identification for businesses; the second is avoiding the administrative headaches of administering an exemption.

Petitioner's claims at least focus on the correct inquiry —whether there is a compelling interest in not exempting Quaring from the photograph requirement. This inquiry properly focuses on the individual, for the Free Exercise Clause is intended, as we observed above, for the protection of the individual, Tribe, *American Constitutional Law, supra,* at § 14-10, p. 855.

The Solicitor General suggests a crippling transformation of the current test [Brief at 6] so that the inquiry focuses not on the individual, but on the interest of the state in the challenged requirement. That test is, as noted, *supra,* p. 14-5, inconsistent with the purposes of the Free Exercise Clause, and with this Court's cases.

Nowhere is the inconsistency between the test proposed by the United States and the case law cast in starker relief

than in *Wisconsin* v. *Yoder, supra,* a case which, not surprisingly, the brief of the United States does not discuss at all. Few state programs reflect a more fundamental interest of the state than compulsory education laws. This being so, on the United States' view, such a finding would end the matter.

It did not, however, end the matter for this Court, which proceeded to inquire whether an exemption for the Amish from secondary public education was so inconsistent with these goals as to outweigh the state's concededly important interest in education. This Court, canvased the ability of the Amish to provide alternatives which would meet much, although surely not all, of the state's interests in the challenged requirement.* It concluded that Amish children received sufficient public education, which, along with the learning provided by the Amish community itself, enabled them to function adequately in Amish society.

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* *In Re Jenison* is also instructive. There, Jenison objected to serving on a jury because it violated her religious beliefs against judging others. The Minnesota Supreme Court rejected this claim, and upheld a contempt conviction, 265 Minn. 96, 120 N.W.2d 515 (1962) on the ground that the state had an important, indeed, compelling interest, in citizen service on juries. No consideration was given to whether that interest would be significantly harmed if Jenison was excused. After this Court remanded for reconsideration in light of *Sherbert* v. *Verner,* 375 U.S. 14 (1963), the Minnesota Supreme Court reversed itself, and dismissed the conviction, 267 Minn. 136, 125 N.W2.d 588 (1963). It found that there was no showing that the state's interest in obtaining jurors would be impaired significantly if Jenison were excused. Under the test proposed by the United States the first decision of the Minnesota Supreme Court was correct, and the case should not have been remanded.

B. *The Asserted Compelling Interest In Positive Identification Is Not Sufficient To Outweigh Quaring's Claims*

The first interest asserted in the photograph requirement is that it provides a secure form of identification for highway stops and financial transactions. This latter suggestion can hardly be taken seriously. No statute requires all Nebraskans, or tourists, to carry photographic identification either in general, or when engaging in financial transactions. To the extent that this interest is intended to protect the well-being of those businesses which engage in such transactions, there is an alternative available which would easily accommodate Quaring. These businesses may simply refuse to do business with persons not having photographic identification.

The other alternative—that of providing sure identification during highway stops—is more weighty. However, in assessing the importance of the state's interest in accurate identification, it must be remembered that the photograph is not the only identification device available to the state. Descriptive material (height, weight, hair and eye color, sex, age, visible scars, and the like) can be required and are obligatory in those states, such as New York, which still does not require photographs on all drivers' licenses. The question, then, is whether the incremental advantage provided by a photograph is sufficiently weighty to overcome Quaring's interest in the Free Exercise of religion. With the courts below, we think not, particularly because whole categories of licenses are exempt from Nebraska's photograph requirement.

C. *Ease of Administration Is Not, On These Facts, A Compelling State Interest*

The second interest asserted by the petitioners is administrative convenience. Claims such as this are not new to Free Exercise cases. Similar arguments were made and rejected in *Sherbert* v. *Verner, supra,* 374 U.S. at 406-07; *Thomas* v. *Rev. Bd., supra,* 450 U.S. at 718-19. *But see, Braunfeld* v. *Brown, supra,* 366 U.S. at 606.

The difference between the cases—aside from the very different attitude towards Free Exercise claims—see *supra,* p. 19, n.*, *supra,* is that in *Braunfeld* v. *Brown,* enforcement of an exemption was thought by this Court to have been completely impractical, because of the incentive to cheat offered by the chance to gain significant competitive advantage. On the other hand the small number of applicants for exemption in *Sherbert* v. *Verner, supra,* and *Thomas* v. *Bd., supra,* coupled with the substantial economic disincentives for turning down employment, made the administrative burden manageable in these cases.

This case is far closer to *Sherbert* v. *Verner, supra,* and *Thomas* v. *Rev. Bd., supra.* The unusual nature of respondent's religious claim, coupled with the disadvantages to the average citizen of turning down a highly useful form of identification, suggest that the problems of administering an exemption will be minimal. While no one seems to know just how many persons could possibly seek an exemption, it seems certain to be substantially less than even the number of Sabbatarians who claim the protection of *Sherbert* v. *Verner, supra,* or *Thomas* v. *Rev. Bd., supra.*

D. *Administrating An Exception Would Not Entangle Government With Religion*

Petitioners also insist that creating an exemption would require sensitive inquiries into religious beliefs, and that this would unduly and impermissibly entangle the state with religion. This argument misconceives the nature of the administrative entanglement branch of the so-called three part test, *Lynch* v. *Donnelly, supra,* 104 U.S. at 1362; *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and, in any event, is belied by the widespread use of religious exemptions in other areas of the law. *See generally,* Marcus, *The Forum of Conscience: Applying Standards Under The Free Exercise Clause,* 1973 Duke L.J. 1217 (1973).

The existence of constitutional rights which touch upon religion means that on occasion government will be called upon to determine whether a particular practice is religious. If that inquiry were to constitute an undue entanglement, the religion clauses themselves would be unconstitutional, *see* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Institutions,* 79 Col. L. Rev. 1514, 1516, at n.9 (1979).

This Court has been careful to avoid that pitfall. Not all inquiries about religion are impermissible, *Mueller* v. *Allen, supra,* 103 S.Ct. at 3071. Brief, non-recurring, non-judgmental, inquiries into whether a textbook is secular or sectarian, for example, are permissible, *Id.* And while inquiries into the truth or falsity of religious beliefs are constitutionally proscribed, inquiries into the sincerity with which those beliefs are held are not. *Thomas* v. *Rev. Bd., supra; U.S.* v. *Ballard,* 322 U.S. 78 (1944). The state and

federal courts, as well as the administrative agencies have had extensive experience in determining sincerity in a variety of cases, ranging from the conscientious exemption statutes (where exemption was quite literally a matter of life and death) to unemployment insurance and claims by prisoners for special treatment, *see, e.g., Africa* v. *Commonwealth of Pennsylvania,* 662 F.2d 1025, 1030-31 (3d Cir. 1981).

The need to single oneself out as different is in itself a significant safeguard against false claims. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee, supra,* 80 Harv. L. Rev. at 1413. Where, as here, there is no apparent non-religious secular interest which would provide a motive for false claims, and where, as a matter of fact, the petitioners suggest no evidence indicating a lack of sincerity on Quaring's part, the assertion that the need to inquire into sincerity would be unworkable is little more than idle speculation, not amounting to a compelling interest, *Sherbert* v. *Verner, supra,* 374 U.S. at 406-07, citing *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).*

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* The United States objects [Brief at 11-12] that this means that the rights of small minorities are given greater protection than those of larger religious groups. The paradox is, of course, a natural outgrowth of compelling interest analysis.

There is, however, a more fundamental objection to this assertion. A religious group of substantial size, even if not a majority, is likely to have sufficient political power to protect its interests, and is less likely to have recourse to the courts. Individuals like Quaring lack the wherewithal to influence the legislature, and if these religious views are not to be silenced, must be able to invoke the Constitution.

Conclusion

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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